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## “Please Note: You Have Waived Everything”: Can Notice Redeem Online Contracts?

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“Please Note: You Have Waived Everything”: Can Notice Redeem Online Contracts?

## “PLEASE NOTE: YOU HAVE WAIVED EVERYTHING”: CAN NOTICE REDEEM ONLINE CONTRACTS?

CHERYL B. PRESTON\*

*Online consumers are largely unaware of the extent to which their actions are governed by legal terms in the form of clickwraps or browsewraps. These contracts are enforced without any evidence of knowing assent to the terms but only if the consumer has some notice that a contract exists. The standards for notice are low and consumers routinely click and browse without forming a single thought relative to the legal obligations that arise with online conduct—legal obligations that frequently would not arise with procuring the same goods and services in the real world. Commentators have been scrambling hopelessly to propose various schemes for bringing home to consumers the fact that they are entering enforceable contracts.*

*This Article debunks the idea that notice of the existence of a contract should be the measure of enforceability. The concept of notice relies on the purely fictional notion that a reasonable consumer with notice of legal provisions will stop, read them, understand the terminology, appreciate their legal significance, and decide to proceed or not. The relish for notice is irreconcilable with our knowledge that consumers do not, and cannot, read and comprehend even a fraction of the wrap contracts they encounter. Moreover, the law punishes those few who read because any hope for persuading a court to undertake an unconscionability analysis of a contract is lost to parties who admit to having read the contract. Thus, the law does not offer consumers a reasonable option for making better decisions about legal*

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\* Edwin M. Thomas Professor of Law, J. Reuben Clark Law School, Brigham Young University. I thank Brandon Stone for excellent research and editing services as well as Nicholas Muhlestein and Jacqueline Pendleton for research contributions. I am indebted to the feedback from various conferences and workshops with the AALS Contract Law Section and the assistance from the faculty workshops at BYU. I thank Nancy S. Kim, Margaret Jane Radin, and Juliet M. Moringiello for feedback on various parts of this Article.

*commitments online. Wrap contracts are merely the means for powerful contract drafters to legislate legal results.*

*This Article contains a review of cases addressing clickwraps and browsewraps in the last decade, which amply illustrates that courts are enforcing them without much, if any, discussion of the length, print, density, or sophistication of the language or the parties, in part, because no one expects consumers to read them. This Article then reviews the duty to read rule, and its meager exceptions, as well as the status of the unconscionability doctrine. This analysis supports little hope that courts will begin to police wrap contract excesses. This Article then reviews and evaluates various proposals for addressing the problem of wrap contracts and concludes that, while most are some improvement, none hold any significant promise for real change. Finally, this Article concludes with several examples of the kind of notice that would be required to give meaning to the theoretical concept that the market will adjust as actors make informed choices.*

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## INTRODUCTION

Consumer online adhesion contracts, clickwraps and browsewraps, sometimes titled Terms of Service or End User License Agreements, are a feature of modern life.<sup>1</sup> There was a time when these wrap contracts were funny. We believed that extreme terms hidden in unexpected places were anomalies and sufficiently preposterous to be fodder for humor. One of the most well-known examples of this was a *Dilbert* cartoon from 1997, where Dilbert, who failed to read the fine print in a software license, finds himself bound to be Bill Gates’s towel boy.<sup>2</sup> In 2003, a *SpongeBob Squarepants* episode included a strict “Company Policy” written in ketchup under the bun on the meat of a Krabby patty.<sup>3</sup> Mr. Krabs, on a brief diversion into having a conscience, stops Spongebob while reading it to the customer, declares that it is the “old policy,” and tells SpongeBob to fulfill the customer’s request.<sup>4</sup>

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1. Such contracts are common, particularly to Internet users, and pop up when installing software or using an Internet e-commerce sales portal. E-commerce sales are sales of goods and services where a contract is formed over an Internet, extranet, Electronic Data Interchange (EDI) network, electronic mail, or other online system. Online e-commerce retail in the United States has been steadily increasing since 2004, and e-commerce sales produced more than sixty-nine billion dollars in transactions in just one quarter of 2013. Ian Thomas et al., U.S. Dep’t of Commerce, *Quarterly Retail E-Commerce Sales 4th Quarter 2013*, U.S. CENSUS BUREAU NEWS, Feb. 18, 2014, at 1. According to one 2011 study, more than eighty percent of Internet users made purchases using the Internet and annual e-commerce sales are expected to reach 1.4 trillion dollars by 2015. Khalid Saleh, *How Big Is E-Commerce Industry*, INVESP BLOG (July 18, 2011, 1:46 PM), <http://www.invesp.com/blog/ecommerce/how-big-is-ecommerce-industry.html>. Retail e-commerce spending in the United States surged fifteen percent in 2012 and rose to be “seven times greater than the corresponding growth rate for total U.S. retail spending.” UNITED PARCEL SERV., UPS PULSE OF THE ONLINE SHOPPER: A CUSTOMER EXPERIENCE STUDY 3 (2013), available at [http://pressroom.ups.com/pressroom/content/Media/Image/2013\\_UPS\\_Online\\_Sopping\\_Customer%20Experience\\_Study\\_White\\_Paper.pdf](http://pressroom.ups.com/pressroom/content/Media/Image/2013_UPS_Online_Sopping_Customer%20Experience_Study_White_Paper.pdf); see also Saleh, *supra* (noting that U.S. e-commerce is growing at a rate of ten percent a year, while global sales are growing at over nineteen percent a year).

2. Scott Adams, *Dilbert Comic Strip for 01/15/1997*, DILBERT.COM, <http://dilbert.com/strips/comic/1997-01-15> (last visited Mar. 30, 2015).

3. *SpongeBob Squarepants: Born Again Krabs* (Nickelodeon Network television broadcast Oct. 4, 2003) (responding to a customer who dropped her Krabby patty on the floor, SpongeBob reads: “Krusty Krab policy clearly states that once the burger has reached the customer, it is his/her responsibility”); see also *Born Again Krabs (Transcript)*, SPONGEBOB.WIKIA.COM, [http://spongebob.wikia.com/wiki/Born\\_Again\\_Krabs\\_%28transcript%29](http://spongebob.wikia.com/wiki/Born_Again_Krabs_%28transcript%29) (last visited Mar. 30, 2015).

4. *SpongeBob Squarepants: Born Again Krabs*, *supra* note 3; see also *Born Again Krabs (Transcript)*, *supra* note 3.

The concept of being caught unaware by overreaching terms hidden in unexpected places is no longer funny. While courts might not enforce an obscure clause demanding involuntary servitude to Bill Gates, they now routinely enforce clauses effectively and practically hidden, requiring one-sided arbitration, disclaiming all liability, and otherwise massively reducing or eliminating the legal rights of an Internet user who happened upon a webpage with a wrap contract.<sup>5</sup> Recently, the press reported on a hotel's online adherence contract where couples wishing to rent rooms for wedding guests agreed in the fine print to pay five hundred dollars per negative review written by any of its guests.<sup>6</sup> The hotel later said its long-posted policy was a joke, but no one was laughing.<sup>7</sup> A comment thread on the *Washington Post's* publication covering the outrageous policy discussed possible arguments to overcome the presumption that it was enforceable.<sup>8</sup>

Online, consumers regularly enter into binding contracts with elaborate, multi-page terms, using unfamiliar, dense, and inaccessible language, which they naively assume are either sufficiently balanced and reasonable or will not be enforceable, if they assume anything. Professor Nancy Kim reports that even law students do not realize that contractual obligations attach to online activities.<sup>9</sup> Online

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5. See, e.g., *Stout v. J.D. Byrider*, 228 F.3d 709, 713, 716 (6th Cir. 2000) (upholding a provision that bound the borrower to arbitration while allowing the lender to pursue judicial remedies for late payments); *Fteja v. Facebook, Inc.*, 841 F. Supp. 2d 829, 838–39 (S.D.N.Y. 2012) (noting Internet users may assent to terms not presented before them); *Smallwood v. NCsoft Corp.*, 730 F. Supp. 2d 1213, 1224–25, 1228 (D. Haw. 2010) (limiting liability to amounts paid to the defendant, regardless of the theory of liability, but holding that liability based on gross negligence may not be disclaimed).

6. *Events and Weddings*, UNION ST. GUESTHOUSE, [http://web.archive.org/web/20140414161828/http://unionstreetguesthouse.com/events\\_weddings.shtml](http://web.archive.org/web/20140414161828/http://unionstreetguesthouse.com/events_weddings.shtml) (last visited Mar. 30, 2015). The page has been revised since the incident received press attention to delete the "Reviews" policy. Eugene Volokh, *Volokh Conspiracy Marketing Genius Award Goes to the Union Street Guest House Hotel (Hudson, New York)*, WASH. POST (Aug. 4, 2014), <http://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/08/04/volokh-conspiracy-marketing-genius-award-goes-to-the-union-street-guest-house-hudson-new-york>.

7. Volokh, *supra* note 6.

8. See orin ed deniro, Comment to Volokh, *supra* note 6, (Aug. 5, 2014, 4:25 AM), <http://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/08/04/volokh-conspiracy-marketing-genius-award-goes-to-the-union-street-guest-house-hudson-new-york>.

9. NANCY S. KIM, WRAP CONTRACTS: FOUNDATIONS AND RAMIFICATIONS 1 (2013) ("[W]hen I ask my law or business school students whether they have entered into any contracts in the past week, few raise their hands... [although] they have

consumers are largely unaware of the legal consequences of their actions, have given up trying to resist, or believe that somewhere there must be a form of justice that will prevent the actual enforcement of the more egregious clauses in wraps. More importantly, however, even if we required enough alarms and buzzers that consumers could not overlook the fact that a contract exists, we cannot assume that they will read online contracts—or that they should.

Even when the wrap does not purport to become binding without acceptance, online users believe that by clicking “I accept” they are effectively agreeing to borrow the software and intellectual property without damaging it, stealing it, or otherwise acting in bad faith with respect to the software.<sup>10</sup> Thus, they believe they are agreeing to a license that is designed to protect software development. Such an expectation is reasonable and is consistent with the user’s intentions and sense of honor. Courts, however, enforce terms that are far more expansive and damaging to the user than simple intellectual property defenses.<sup>11</sup> Many users are unaware that courts are enforcing contract terms—hidden behind hyperlinks or embedded elsewhere on a webpage—that were previously unenforceable but now waive important rights and consumer protections.

Faced with what Professor Nancy Kim, Margaret Radin, Amy Schmitz, and others have painstakingly revealed about the harms of wrap contracts,<sup>12</sup> scholars have squandered the last decade arguing that the solution is to provide the user with sufficient “notice.”

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checked their online banking account, or downloaded software or music, or posted to their Facebook or Twitter accounts . . .”).

10. The user understands some equivalent of the following and nothing else: “I agree that the software and other intellectual property that powers this site is the sole property of online service provider and I am permitted to use it only for purposes of this site. I will not copy, damage, interfere with, or otherwise diminish the use and value of such intellectual property. I understand that the details of the permissible uses are available here (with hyperlink).”

11. Professor Kim aptly noted that while some provisions in wrap contracts may be shields to protect businesses’ legitimate interests, many are swords functioning to destroy the other party’s legal rights and crooks used for “stealthy appropriation (via a non-negotiated agreement), of benefits ancillary or unrelated to the consideration.” Nancy S. Kim, *Contract’s Adaptation and the Online Bargain*, 79 U. CIN. L. REV. 1327, 1337–42 (2011).

12. See, e.g., KIM, *supra* note 9; MARGARET JANE RADIN, *BOILERPLATE: THE FINE PRINT, VANISHING RIGHTS, AND THE RULE OF LAW* (2012); Kim, *supra* note 11; Amy J. Schmitz, *Legislating in the Light: Considering Empirical Data in Crafting Arbitration Reforms*, 15 HARV. NEGOT. L. REV. 115 (2010) [hereinafter Schmitz, *Legislating*]; Amy J. Schmitz, *Pizza-Box Contracts: True Tales of Consumer Contracting Culture*, 45 WAKE FOREST L. REV. 863 (2010).

Notice might be a miracle healer if drafters were required to provide effective notice in a one-swallow, palatable pill. But notice of what? In a quick-click culture, “I accept” means nothing. No one can seriously argue that any reasonable person would, or should, follow all of the “I accept” links encountered when online, even if the link is apparent.

Further, under the current legal regime, online consumers will typically be better off if they do not read the contract. Thus, notice can actually be harmful. Perhaps the best option currently available is for an online consumer to simply “click and cringe.”<sup>13</sup> This Article demonstrates why. It evaluates various proposals for solving abuses involving wrap contracts, concluding that, while most are some improvement, none hold much promise for any real change. If policy makers insist on falling back to a concept of “notice” to avoid policing contract drafters, notice must reduce the wrap terms down to a meaningful, understandable bite-size format to alert a reader to significant risks and enable comparison shopping with a reasonable exertion of time.

Part I provides context on the extent to which wrap contracts are currently enforced in the courts. It includes a review of existing case law on clickwrap and browsewrap contracts. Part II explores many reasons why, under current law, reading a wrap contract is not a sensible option, including the counterproductive consequences of the duty to read rule. Part III reviews and evaluates a variety of proposals for solving the problems of wrap contracts. Part IV provides suggestions for preventing wrap abuses and allowing consumers to meaningfully shop around among competing online dealers.

## I. WRAPS AND THE COURTS

Courts are now enforcing wrap contracts that would have been considered unconscionable in the early years when courts were beginning to recognize the utility of adhesive standard form contracts.<sup>14</sup> This Article is not the place for a detailed review of all the recent wrap contract cases or cases in other contexts where courts have recently considered enforceability doctrines such as unconscionability. A general overview of trends with a few examples will suffice.

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13. See Nancy S. Kim, *Clicking and Cringing*, 86 OR. L. REV. 797, 822 (2007).

14. Cheryl B. Preston & Eli McCann, *Llewellyn Slept Here: A Short History of Sticky Contracts and Feudalism*, 91 OR. L. REV. 129, 169–70 (2012) (arguing that courts are too accepting of boilerplate terms and standard forms); see also, e.g., *Cicle v. Chase Bank USA*, 583 F.3d 549, 557 (8th Cir. 2009) (reversing the district court’s finding of unconscionability and enforcing the contract terms despite the unfair credit practices alleged by the plaintiff).



A. *Venue Selection Clauses, Arbitration Clauses, and Rolling Contracts*

Choice-of-venue clauses in adhesion contracts were, for a time, resisted by courts.<sup>15</sup> However, since the Supreme Court opinion in *Carnival Cruise Lines, Inc. v. Shute*,<sup>16</sup> most courts now dismiss objections, stating that choice-of-venue clauses are routine and will be enforced unless some dramatic and extraordinary hardship is shown.<sup>17</sup>

Like the historical treatment of forum selection clauses, some courts have resisted arbitration clauses.<sup>18</sup> However, the Supreme Court signaled a willingness to enforce arbitration in almost all circumstances with its holding in *Rent-A-Center, West, Inc. v. Jackson*.<sup>19</sup> *Rent-A-Center* upheld the policy of encouraging arbitration at the expense of allowing judicial review of objections to contracts containing such clauses, including when unconscionability is raised.<sup>20</sup> A few courts continue to resist enforcing the more onerous incantations of arbitration clauses, especially those that waive class actions, are one sided, impose onerous fees on consumers, or are inserted into existing contracts post-formation without sufficient notice.<sup>21</sup> Most

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15. See *Polzin v. Appleway Equip. Leasing, Inc.*, 191 P.3d 476, 479, 482 (Mont. 2008) (reversing the district court, which held that “choice of forum clauses are void as unconstitutional” and against public policy); see also Patrick J. Borchers, *Forum Selection Agreements in the Federal Courts After Carnival Cruise: A Proposal for Congressional Reform*, 67 WASH. L. REV. 55, 56–57 (1992) (explaining American courts’ refusal to enforce forum selection agreements was “out of step” with most foreign judicial systems).

16. 499 U.S. 585 (1991).

17. See *Major v. McCallister*, 302 S.W.3d 227, 229 (Mo. Ct. App. 2009) (charging parties attempting to resist such provisions with the “heavy burden” of proving the clause is unfair or unreasonable); *Copelco Capital, Inc. v. Shapiro*, 750 A.2d 773, 775 (N.J. Super. Ct. App. Div. 2000) (noting “forum selection clauses are generally enforce[able]” unless the chosen forum is “so gravely difficult and inconvenient” that it will deprive the challenger of her day in court (citations omitted)); see also Keri Bruce, Note, *The Hague Convention on Choice-of-Court Agreements: Is the Public Policy Exception Helping Click-Away the Security of Non-Negotiated Agreements?*, 32 BROOK. J. INT’L L. 1103, 1123–24 (2007) (discussing the argument that enforcement of such adhesion contracts promotes economic efficiency).

18. See, e.g., *Iberia Credit Bureau, Inc. v. Cingular Wireless LLC*, 379 F.3d 159, 169 (5th Cir. 2004) (refusing to enforce arbitration clause that requires customer to arbitrate but not the provider); *Taylor v. Butler*, 142 S.W.3d 277, 286 n.4 (Tenn. 2004) (accepting the majority view that one-sided arbitration clauses are unconscionable).

19. 561 U.S. 63 (2010).

20. *Id.* at 72–73, 75–76.

21. See, e.g., *Chavarria v. Ralphs Grocery Co.*, 733 F.3d 916, 922–25 (9th Cir. 2013) (upholding the district court’s denial of an employer’s motion to compel arbitration because the policy was provided after contract formation and the clause was one-sided and imposed high fees without the possibility of recovery); *Schnabel v. Trilegiant Corp.*, 697 F.3d 110, 126 (2d Cir. 2012) (declining to compel arbitration

attempts to invalidate choice-of-venue or arbitration clauses in wrap contracts on the basis of unconscionability fail,<sup>22</sup> although there is one notable exception in an unreported California opinion.

In *Mazur v. eBay Inc.*,<sup>23</sup> the District Court for the Northern District of California ruled that the wrap contract was procedurally and substantively unconscionable.<sup>24</sup> Oppression was present because the contract was adhesive, and surprise was present because the Terms and Conditions were presented to the plaintiff in a form that could only be read a few single-spaced lines at a time. Furthermore, the contract was in block-text format, creating a “massive block of impenetrable text,” even when printed out.<sup>25</sup>

The court defined substantive unconscionability as when the contract includes “overly harsh or one-sided results.”<sup>26</sup> The contract was substantively unconscionable because, in part, it contained an arbitration agreement the court characterized as not bilateral and practically calling for non-neutral decision maker.<sup>27</sup> The clause, although technically bilateral,<sup>28</sup> consistently worked to the disadvantage of the weaker party, undermining its fairness.<sup>29</sup> The court stressed the lack of mutuality.<sup>30</sup> It is comforting to know that there is some point at which a court will reject an arbitration clause in

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because consumers were not given notice of arbitration provision until after initial enrollment and therefore did not assent to the provision).

22. *See, e.g.*, *Swift v. Zynga Game Network, Inc.*, 805 F. Supp. 2d 904, 915 (N.D. Cal. 2011) (enforcing clickwrap that included arbitration clause after plaintiff failed to produce evidence of procedural unconscionability); *Recursion Software, Inc. v. Interactive Intelligence, Inc.*, 425 F. Supp. 2d 756, 783 (N.D. Tex. 2006) (concluding that “clickwrap licenses . . . are valid and enforceable contracts,” and enforcing an arbitration clause when the user was required to accept before installing software); *Mortg. Plus, Inc. v. DocMagic, Inc.*, No. 03-2582, 2004 WL 2331918, at \*5, \*7 (D. Kan. Aug. 23, 2004) (holding an inconvenience is insufficient to overcome a valid arbitration clause even though the clause was introduced after the initial contract formation but the buyer was required to accept the wrap by a click before installing the software); *Barnett v. Network Solutions, Inc.*, 38 S.W.3d 200, 204 (Tex. App. 2001) (clarifying that “[i]t is the unfair use of, not the mere existence of, an unequal bargaining power” that will invalidate a contract, and upholding the forum-selection agreement).

23. No. C 07-03967, 2008 WL 618988 (N.D. Cal. Mar. 4, 2008).

24. *Id.* at \*5, \*7. The court defined procedural unconscionability as “oppression and surprise.” *Id.* at \*4.

25. *Id.* at \*5.

26. *Id.* at \*6.

27. *Id.* at \*6–7.

28. *Id.* at \*1 (quoting contract text).

29. *Id.* at \*6.

30. *Id.*

a wrap contract, but by failing to mark the opinion for publication, the court nullified its potential effect as precedent.

Another interesting development is the collateral damage of Judge Easterbrook’s facially narrow opinion in *ProCD, Inc. v. Zeidenberg*.<sup>31</sup> Although the case involved contractual terms that appeared after the software was purchased, the contract was printed in the product manual inside the box and appeared on screen when the software was installed and every time the user ran the software. Zeidenberg ignored those terms and engaged in an intentional theft of a database with full knowledge of the higher charge for his intended use.<sup>32</sup> Moreover, the opinion itself is limited by various requirements, including the ability to return the product for a refund for some time after purchase.<sup>33</sup> Nonetheless, this case is regularly cited in lower court opinions that conclude that wrap contracts are now enforceable without further inquiry.<sup>34</sup>

This trend illustrates the circularity of judicial review: one court finds a new kind of contract enforceable, and other courts then assume enforceability because “everyone is doing it” without performing a thorough analysis of the earlier opinions and distinguishing the facts.<sup>35</sup> As the Tenth Circuit observed in *Hancock v.*

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31. 86 F.3d 1447 (7th Cir. 1996).

32. *See id.* at 1449–50 (discussing the higher price that Zeidenberg would have had to pay for the license to do what he did and noting that Zeidenberg “decided to ignore the license”); Cheryl B. Preston & Eli W. McCann, *Unwrapping Shrinkwraps, Clickwraps, and Browserwraps: How the Law Went Wrong from Horse Traders to the Law of the Horse*, 26 BYU J. PUB. L. 1, 8–12 (2011) (detailing the often overlooked context of *ProCD* and challenging some of the assumptions made in the opinion).

33. *ProCD*, 86 F.3d at 1452 (analogizing the situation to the definition of “acceptance of goods” that holds the buyer accepts the goods “when, after an opportunity to inspect, he fails to make an effective rejection” (citing U.C.C. § 2-606(1)(b) (1995))).

34. Preston & McCann, *supra* note 14, at 137; *see, e.g.*, *Hayes v. SpectorSoft Corp.*, No. 1:08-cv-187, 2009 WL 3713284, at \*8 (E.D. Tenn. Nov. 3, 2009) (“SpectorSoft had every right to expect that its software should be used in accordance with the licensing agreement it provides. Such agreements are enforceable when they require a purchaser to click on messages such as ‘Yes’ or ‘I agree’ in order to install software.” (citation omitted) (citing *ProCD*, 86 F.3d at 1452)); *Feldman v. Google, Inc.*, 513 F. Supp. 2d 229, 241 (E.D. Pa. 2007) (arguing that “[a] contract is not necessarily one of adhesion simply because it is a form contract” and citing *ProCD*, 86 F.3d at 1451, to show the “prevalence and importance” of standardized contracts”).

35. The fact that so many of the recent clickwrap and browserwrap contract cases are not reported reflects the judicial view that these issues are settled. *See, e.g.*, *Be In, Inc. v. Google Inc.*, No. 12-CV-03373, 2013 WL 5568706, at \*9 (N.D. Cal. Oct. 9, 2013) (stating that browserwraps are enforceable, as long as there is notice to the user); *5381 Partners LLC v. ShareASale.com, Inc.*, No. 12-CV-4263, 2013 WL

*American Telephone & Telegraph Co.*,<sup>36</sup> “[c]lickwrap agreements are increasingly common and ‘have routinely been upheld.’”<sup>37</sup>

### B. Clickwraps

Clickwrap agreements are the generally enforceable, standard form contracts that Internet users assent to merely by clicking an “I agree” option.<sup>38</sup>

Most cases enforcing clickwraps hold that clicking is an acceptable way to indicate assent and stop before undertaking any analysis about the mere click in combination with the nature of the included terms, as well as the language complexity, density, and length.<sup>39</sup> Even if

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5328324, at \*6–7, \*9 (E.D.N.Y. Sept. 23, 2013) (enforcing a “hybrid” clickwrap/browsewrap contract); *Burcham v. Expedia, Inc.*, No. 4:07CV1963, 2009 WL 586513, at \*4 (E.D. Mo. Mar. 6, 2009) (“Burcham used the website, and he did so using an account that bore his own name. Expedia is not required to prove anything more to show that Burcham assented to the terms of the website. That Burcham either didn’t read the agreement or didn’t see it may be unfortunate for him, but it does not change the outcome. Burcham is bound by the terms of the website’s user agreement.”); *Cairo, Inc. v. Crossmedia Servs., Inc.*, No. C 04-04825, 2005 WL 756610, at \*5 (N.D. Cal. Apr. 1, 2005) (holding that “repeated and automated use of [Crossmedia Services’] web pages can form the basis of imputing knowledge to Cairo of the terms [of the browsewrap agreement]”).

36. 701 F.3d 1248 (10th Cir. 2012).

37. *Id.* at 1256 (quoting *Smallwood v. NCsoft Corp.*, 730 F. Supp. 2d 1213, 1226 (D. Haw. 2010)).

38. Mark A. Lemley, *Terms of Use*, 91 MINN. L. REV. 459, 459–60 (2006); see also William J. Condon, Jr., Comment, *Electronic Assent to Online Contracts: Do Courts Consistently Enforce Clickwrap Agreements?*, 16 REGENT U. L. REV. 433, 454–57 (2004) (demonstrating that courts consider wrap contracts valid if the user clicked “I Agree” or the like).

39. See, e.g., *Serrano v. Cablevision Sys. Corp.*, 863 F. Supp. 2d 157, 164 (E.D.N.Y. 2012) (upholding enforceability of clickwrap contracts when the consumer has sufficient opportunity to read the agreement, is given an unambiguous method of accepting or declining, and assents); *Kwan v. Clearwire Corp.*, No. C09-1392, 2012 WL 32380, at \*9 (W.D. Wash. Jan. 3, 2012) (finding that if the plaintiff clicked, she was bound to the wrap contract); *FreeLife Int’l, Inc. v. Am. Educ. Music Publ’ns Inc.*, No. CV07-2210, 2009 WL 3241795, at \*5 (D. Ariz. Oct. 1, 2009) (enforcing a non-disparagement clause in a clickwrap that made the user liable for “millions of dollars in damages for speaking the truth” and noting that “in many jurisdictions, online contracts of adhesion are regularly upheld as long as the applicant expresses assent to the terms of the agreement” (citing *Feldman*, 513 F. Supp. 2d at 236)); *Guadagno v. E\*Trade Bank*, 592 F. Supp. 2d 1263, 1271 (C.D. Cal. 2008) (enforcing a contract because there is evidence that a user clicked “I Agree”); *Jallali v. Nat’l Bd. of Osteopathic Med. Exam’rs, Inc.*, 908 N.E.2d 1168, 1173 (Ind. Ct. App. 2009) (finding that consenting to the “terms and conditions” by clicking a “dialog box on the screen in order to proceed with the internet transaction” creates an enforceable contract).

clicking were the equivalent of a signature, that alone does not resolve the issue of unconscionability.

Only a few cases discuss other factors besides the click. One is *Doe v. SexSearch.com*,<sup>40</sup> where the court addressed not only the legitimacy of clicking as acceptance but also the content of the terms.<sup>41</sup> In addition to finding that clicking indicated terms were freely bargained for, the court enforced a limitation on liability against an unconscionability claim where “the terms are highlighted in bold, capital letters and with hyperlinks to highlight some of the more important terms.”<sup>42</sup> Of course, a user may click without finding, reading, or understanding the terms. The provision in question disclaimed all “responsibility for verifying[] the accuracy of the information provided by other users of the service.”<sup>43</sup> The court did not address the length or density of the entire wrap, just this single provision.<sup>44</sup>

To support its conclusion that the limitation on liability was not unconscionable, the *SexSearch* court cited two other cases where courts had evaluated the way the terms were presented. In *Hubbert v. Dell Corp.*,<sup>45</sup> the court found the terms sufficiently conspicuous where the link to the clickwrap contract was in a “contrasting blue color,” the disputed clause was “partially in capital letters,” and the beginning of the terms were in “bold, capital letters.”<sup>46</sup> The Eastern District of Pennsylvania in *Feldman v. Google, Inc.*<sup>47</sup> enforced a clickwrap that was in “readable 12-point font,” was “only seven paragraphs long,” and could be viewed in a “printer-friendly, full-screen version.”<sup>48</sup> *Forrest v. Verizon Communications, Inc.*<sup>49</sup> is another case where the court enforced a forum-selection clause in a clickwrap, despite the fact that the thirteen-page printed agreement only appeared in a small scroll box on a monitor with only portions visible at a time, and the forum-selection clause was located in the

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40. 502 F. Supp. 2d 719 (N.D. Ohio 2007), *aff'd on other grounds*, 551 F.3d 412 (6th Cir. 2008).

41. *Id.* at 729.

42. *Id.* at 735–36.

43. *Id.* at 737.

44. Nor did the court consider whether the user could have clicked without finding, reading, or understanding the terms. *Id.*

45. 835 N.E.2d 113 (Ill. Ct. App. 2005).

46. *Id.* at 124.

47. 513 F. Supp. 2d 229 (E.D. Pa. 2007).

48. *Id.* at 237.

49. 805 A.2d 1007 (D.C. 2002).

final section and presented in lowercase font.<sup>50</sup> These standards are not particularly high and fail to account for the reality that users cannot afford the time to read wraps and may not understand the implications of even ordinary language with legal terms.

In short, current standards for denying claims of procedural unconscionability are sufficiently low that they would rout unconscionability challenges for almost all wrap contracts. This can be seen, for example, in a recent case in the Northern District of West Virginia.<sup>51</sup> The case does not involve a wrap contract, but the standard, by its terms, would cover almost all Internet users. The court found that procedural unconscionability is foreclosed when a person is literate, has the opportunity to read, admits an attorney could have been retained to review the contract, was not rushed into signing, and had the opportunity to ask questions.<sup>52</sup> Under this standard, almost everyone using the Internet in America would be disqualified from asserting procedural unconscionability. The only factor that might be distinguished is the opportunity to ask questions, but, presumably, a website with a customer service email might suffice.<sup>53</sup> Webpages with wrap contracts typically make asking questions inconvenient, even when a human being can be reached directly. Such a person would (and should) be instructed not to give legal advice or interpret the language of the wrap. As a result,

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50. *Id.* at 1010–11; *see also In re RealNetworks, Inc., Privacy Litig.*, No. 00 C 1366, 2000 WL 631341, at \*1, \*5–6 (N.D. Ill. May 8, 2000) (finding reasonable notice that clickwrap agreement terms existed where the user had to agree to the terms in order to install software, and the agreement came in a small pop-up window in the same font-size as words in the computer’s own display and with the arbitration clause located at the end of the agreement); *Caspi v. Microsoft Network, L.L.C.*, 732 A.2d 528, 530, 532 (N.J. Super. Ct. App. Div. 1999) (finding that reasonable notice of the terms of a clickwrap agreement was provided where the user had to click “I agree” before proceeding with registration, the agreement was presented in a scrollable window, and the forum selection clause was presented in lower case letters in the last paragraph of the agreement).

51. *Dan Ryan Builders, Inc. v. Nelson*, No. 3:10-CV-76, 2014 WL 496775 (N.D.W. Va. Feb. 6, 2014).

52. *Id.* at \*12–13. Similarly, in a case involving a real estate purchase, the same court denied procedural unconscionability where the plaintiffs admitted that they skimmed the documents, could have retained an attorney, were not rushed into closing, and had the opportunity to ask questions. *Schultz v. Dan Ryan Builders, Inc.*, No. 3:12-CV-15, 2013 WL 3365244, at \*11–12 (N.D.W. Va. July 3, 2013).

53. *See Nelson*, 2014 WL 496775, at \*2, \*12 (highlighting that, not only did plaintiff have the opportunity to ask questions, but the other party would “seek clarification” if she was unable to answer the question immediately); *Schultz*, 2013 WL 3365244, at \*11 (noting that the plaintiffs had the opportunity to ask questions and were not rushed).

websites can easily circumvent this requirement by giving a customer an opportunity to ask questions while frustrating the possibility of obtaining helpful information.

*i.Lan Systems, Inc. v. Netscout Service Level Corp.*<sup>54</sup> provides a more honest approach, where the court admitted that the clickwrap license agreement, which added terms limiting liability and disclaiming warranties in a preexisting agreement, would require at least fifteen minutes to read, and acknowledged that the users “probably do not agree in [their] heart of hearts, but [they] click anyway, not about to let some pesky legalese delay the moment for which [they have] been waiting.”<sup>55</sup> Nonetheless, the court enforced the clickwrap.<sup>56</sup>

### C. Browsewraps

Some courts and scholars have stressed the distinction between clickwraps, where the user clicks something that might trigger the recognition that there are legal terms, and browsewraps where no clicking or other evidence of assent is necessary. Mark Lemley observed that “an increasing number of courts have enforced ‘browsewrap’ licenses, in which the user does not see the contract at all but in which the license terms provide that using a Web site constitutes agreement to a contract whether the user knows it or not.”<sup>57</sup>

In *Specht v. Netscape Communications Corp.*,<sup>58</sup> the court refused to enforce a browsewrap where notice of the wrap was merely a link to the terms, and the link was not visible on the webpage without scrolling down.<sup>59</sup> Such “submerged” links have led other courts to deny the enforcement of browsewraps.<sup>60</sup> If the link or other mention

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54. 183 F. Supp. 2d 328 (D. Mass. 2002).

55. *Id.* at 329, 337.

56. *Id.* at 339 (determining that the clickwrap intended to patch any holes remaining from prior agreements between the parties).

57. Mark A. Lemley, *Terms of Use*, 91 MINN. L. REV. 459, 460 (2006); see also William J. Condon, Jr., *Electronic Assent to Online Contracts: Do Courts Consistently Enforce Clickwrap Agreements?*, 16 REGENT U. L. REV. 433, 454–57 (2004) (demonstrating that courts consider wrap contracts valid if the user clicked “I Agree” or the like).

58. 306 F.3d 17 (2d Cir. 2002).

59. *Id.* at 35.

60. See, e.g., *Syndicate 1245 at Lloyd’s v. Walnut Advisory Corp.*, No. 09-1697, 2011 WL 5825979, at \*5 (D.N.J. Nov. 16, 2011) (refusing to enforce a wrap when the links to the contract were not added to the webpage until after the contract was formed and the links were submerged); *Hines v. Overstock.com, Inc.*, 668 F. Supp. 2d 362, 367 (E.D.N.Y. 2009) (finding that a submerged reference to wrap terms provided insufficient notice), *aff’d*, 380 F. App’x 22 (2d Cir. 2010); *Hoffman v.*

of the wrap is visible on the home page, courts do not require any evidence of assent more than browsing the page.<sup>61</sup> However, one court found the gray link, although not submerged, virtually invisible on a gray background.<sup>62</sup> More recently, some courts have suggested that someone who has visited a site more than once is deemed to have notice of the browsewrap terms.<sup>63</sup> Arguably, courts will soon

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Supplements Togo Mgmt., LLC, 18 A.3d 210, 219–20 (N.J. Super. Ct. App. Div. 2011) (finding a submerged disclaimer unenforceable).

61. See, e.g., *Register.com, Inc. v. Verio, Inc.*, 356 F.3d 393, 401–03 (2d Cir. 2004) (holding that the customer gave consent because the user returned to the site daily, the user was made aware of the terms and agreements, and active assent was not necessary); *Harris v. comScore, Inc.*, 825 F. Supp. 2d 924, 926–27 (N.D. Ill. 2011) (denying motion to dismiss where plaintiff alleged that the link to the wrap was “obscured during the installation process,” although noting that if the link were shown to be visible after “further factual development,” the browsewrap could be enforced); *Cairo, Inc. v. Crossmedia Servs., Inc.*, No. C 04-04825, 2005 WL 756610, at \*4–5 (N.D. Cal. Apr. 1, 2005) (finding the user had knowledge of the terms and conditions through repeated visits to the web page, which constituted acceptance of the terms); *Canon Fin. Servs., Inc. v. Eufaula Sch. Dist.*, No. L-2063-11, 2012 WL 1989225, at \*1–2 (N.J. Super. Ct. App. Div. June 4, 2012) (per curiam) (enforcing terms appearing above a space for the customer’s initials); *Major v. McCallister*, 302 S.W.3d 227, 230 (Mo. Ct. App. 2009) (finding that user assented to forum selection clause contained in a browsewrap agreement because the page stated “[b]y submitting you agree to the Terms of Use” next to a button pushed to continue in the site and where links to the wrap were visible on every website page). The court in *Traton News, LLC v. Traton Corp.*, 914 F. Supp. 2d 901 (S.D. Ohio 2012), *aff’d in part*, 528 F. App’x 525 (6th Cir. 2013), took an intriguing approach to browsewraps and passive users. The court avoided application of a browsewrap, and held that the contract should not be enforced for failure of consideration when the user did not “obtain[] a benefit from using the website.” *Id.* at 910. This issue was not addressed on appeal, where the court found the browsewrap did not relate to the dispute, and thus the case fell outside of the forum selection clause. *Traton News, LLC v. Traton Corp.*, 528 F. App’x 525, 526 (6th Cir. 2013).

62. See *Pollstar v. Gigmania Ltd.*, 170 F. Supp. 2d 974, 981 (E.D. Cal. 2000) (finding that reasonable notice of the terms of a browsewrap agreement was not provided when a hyperlink to the terms appeared in small gray print on a gray background).

63. See *Molnar v. 1-800-Flowers.com, Inc.*, No. CV 08-0542, 2008 WL 4772125, at \*7 (C.D. Cal. Sept. 29, 2008) (“[C]ourts have held that a party’s use of a website may be sufficient to give rise to an inference of assent to the Terms of Use contained therein (so called ‘browsewrap contracts’).”); *Ticketmaster L.L.C. v. RMB Techs., Inc.*, 507 F. Supp. 2d 1096, 1107 (C.D. Cal. 2007) (holding that it was highly likely to be shown that the defendant viewed and navigated the website, and received notice of and assented to the terms and conditions by using the website); *Pollstar*, 170 F. Supp. 2d at 981–82 (finding that dismissal of the provider’s breach of contract claim is inappropriate, even though visitors to plaintiff’s website were presumably “not aware that the license agreement is linked to the homepage” and “the user is not immediately confronted with the notice of the license agreement”).



find that anyone who is not a computer neophyte must know terms appear somewhere, and so their visit to any site implies consent.

To see the interplay between browsewrap and clickwrap agreements, the court in *Tompkins v. 23andMe, Inc.*<sup>64</sup> provides an interesting analysis of how each agreement is either successful or unsuccessful within the same website.<sup>65</sup> The court first considered the enforceability of the website browsewrap based on the plaintiffs’ use of the site for a product purchase.<sup>66</sup> The court found the wrap unenforceable at that point because “the only way for a customer to see the [Terms of Service] at that stage was to scroll to the very bottom of the page and click a link under the heading ‘LEGAL.’”<sup>67</sup> However, the court enforced the same agreement through a clickwrap, which was based on the purchasers’ post-purchase action in creating online accounts to register their products: “The fact that the [Terms of Service] were hyperlinked and not presented on the same screen does not mean that customers lacked adequate notice.”<sup>68</sup>

The *Tompkins* court cited *Fteja v. Facebook, Inc.*,<sup>69</sup> where the only possible place to click was on the “Sign Up” box.<sup>70</sup> The click was effective even though the user had not been presented with the terms.<sup>71</sup> The product’s usefulness was dependent on registering them for post-purchase service by creating an account. The *Tompkins* court states this is sufficient because users creating an account are directed to new terms even though not prompted to review them. Thus, the court was not troubled by enforcing the terms of the browsewrap that it expressly found were insufficient to give users notice in advance of purchase.<sup>72</sup>

At this point, the analysis parallels that used in *ProCD* for shrinkwrap contracts.<sup>73</sup> The contract to purchase morphs into a

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64. No. 5:13-CV-05682-LHK, 2014 WL 2903752 (N.D. Cal. June 25, 2014).

65. *See id.* at \*5 (explaining that when a customer buys and receives a product, the customer is implicitly accepting a shrinkwrap agreement, which is inside the box, when he or she opens and keeps the product).

66. *Id.* at \*6.

67. *Id.*

68. *Id.* at \*8.

69. 841 F. Supp. 2d 829 (S.D.N.Y. 2012).

70. *Id.* at 834–35.

71. *See id.* at 837–38 (comparing a typical clickwrap agreement, where the website forces the user to view the terms and conditions before assenting, to the instant case where a hyperlink to the terms and conditions was provided, but the user could assent without actually looking at the terms).

72. *Tompkins*, 2014 WL 2903752, at \*7–8.

73. *Compare ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1449, 1452 (7th Cir. 1996) (ruling that shrinkwrap licenses are enforceable because the purchaser can reject the

contract for continuing use once the terms are made available later. However, in *ProCD* and subsequent shrinkwrap cases, the terms supplied after purchase are only enforceable if the seller offers a reasonable opportunity for the purchasers to return the product once they are aware of the terms.<sup>74</sup> Moreover, such rolling contracts are typically only enforced when the purchasers perform an intentional act of accepting the later terms, such as clicking “I accept.”<sup>75</sup> The *Fleja* court makes no mention of a refund possibility,

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terms and conditions by returning the product), *with Tompkins*, 2014 WL 2903752, at \*8 (holding that the clickwrap agreement was enforceable because the purchaser had to take action on the website post-purchase when the purchaser clicked a button acknowledging assent to the terms and conditions).

74. *See, e.g., Register.com, Inc. v. Verio, Inc.*, 356 F.3d 393, 403 (2d Cir. 2004) (distinguishing enforceable shrinkwrap cases where the customer was notified of the opportunity to return for a refund); *ProCD*, 86 F.3d at 1452 (explaining enforceability is tied to the opportunity to return the product if the terms provided later are unacceptable); *Schnabel v. Trilegiant Corp.*, No. 3:10-CV-957, 2011 WL 797505, at \*5 (D. Conn. Feb. 24, 2011) (citing *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147, 1150 (7th Cir. 1997)) (noting that the instant case differed from typical shrinkwrap cases such as *Hill v. Gateway* because the purchasers never received notice of the additional terms, nor an opportunity to reject these terms); *Kaufman v. Am. Express Travel Related Servs. Co.*, No. 07 C 1707, 2008 WL 687224, at \*7–8 (N.D. Ill. Mar. 7, 2008) (concluding that terms were “not enforceable because Kaufman was not presented with any indication that there might be an opportunity to cancel the contract by returning the card once the Agreement’s terms were made known to him,” although defendant had a policy of accepting returns and argued that Kaufman should have intuitively known that); *DeFontes v. Dell, Inc.*, 984 A.2d 1061, 1071–73 (R.I. 2009) (holding that the shrinkwrap agreement failed to adequately inform the buyers of their right to reject and return the goods and, therefore, the buyer’s retention of the goods did not indicate assent to the terms of the contract).

75. *See, e.g., ProCD*, 86 F.3d at 1452 (holding that a purchaser assents to a product’s terms when he or she uses the product after having the opportunity to read the terms); *Hayes v. SpectorSoft Corp.*, No. 1:08-cv-187, 2009 WL 3713284, at \*8 (E.D. Tenn. Nov. 3, 2009) (“SpectorSoft had every right to expect that its software should be used in accordance with the licensing agreement it provides. Such agreements are enforceable when they require a purchaser to click on messages such as ‘Yes’ or ‘I agree’ in order to install software.” (citation omitted)); *Specht v. Netscape Commc’ns Corp.*, 150 F. Supp. 2d 585, 595 (S.D.N.Y. 2001) (“Netscape’s failure to require users of SmartDownload to indicate assent to its license as a precondition to downloading and using its software is fatal to its argument that a contract has been formed. Furthermore, unlike the user of Netscape Navigator or other click-wrap or shrink-wrap licensees, the individual obtaining SmartDownload is not made aware that he is entering into a contract.”), *aff’d*, 306 F.3d 17 (2d Cir. 2002); *cf. Burcham v. Expedia, Inc.*, No. 4:07CV1963, 2009 WL 586513, at \*3 (E.D. Mo. Mar. 6, 2009) (enforcing a terms-later contract that required clicking to accept, but noting in dicta that, although such affirmative act to accept is often essential, it may not be required in all cases (citing *Register.com*, 356 F.3d at 403)).

and the post-purchase contract required no affirmative assent.<sup>76</sup> Another odd feature about this case is that, in reaching the second holding, the *Fteja* court did not review in this context the cases where browsewraps were not enforced that the court cited in connection with the first holding.<sup>77</sup> These include *Hines v. Overstock.com, Inc.*,<sup>78</sup> where the court held that the link to the browsewrap terms was not sufficiently prominently displayed.<sup>79</sup>

Combination or step-wraps, where the elements of a rolling contract are combined with a clickwrap and a browsewrap, may be the point where courts will acknowledge the limits of constructive notice of particular terms. While the combination of a rolling contract with a clickwrap is generally enforceable,<sup>80</sup> the District of Colorado found it a question of fact whether sufficient notice was provided of an arbitration requirement when the clickwrap license agreement merely referenced a separate Terms of Service and advised the reader to locate and read the terms online.<sup>81</sup> Without mentioning the time such procedures would entail, the court nonetheless observed:

[T]o reach the arbitration clause requires the user to leave the installation program, log onto the Internet (if possible), navigate to the proper page, and read the Subscriber Agreement, then return to the installation program’s scroll down window to read the remaining ten pages of the High-Speed Internet Modem Installation Legal Agreement before choosing whether to agree to the terms. In addition, the arbitration issue is confused by the fact that the readily available agreements . . . provide a forum in the court system for resolution of conflicts . . . . This creates an ambiguity regarding recourse in the event of a dispute.<sup>82</sup>

In the analyses of wrap agreements, little time is spent discussing the conscionability of the agreement itself. In short, courts in the last few decades have trended toward enforcing adhesion contracts

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76. *Fteja*, 841 F. Supp. 2d at 839 (concluding that being prompted to accept the hyperlinked phrase “Terms of Use” before using Facebook’s services rendered reading the terms irrelevant).

77. *See id.* at 838 (noting that *Hines v. Overstock.com* explains that a clickwrap typically is enforceable when the user clicks “I agree” after being presented with the terms and conditions).

78. 668 F. Supp. 2d 362 (E.D.N.Y. 2009), *aff’d*, 380 F. App’x 22 (2d Cir. 2010).

79. *Id.* at 367.

80. *See supra* notes 73–75 and accompanying text (discussing that a purchaser must take an action, like failing to return the product, to conclude a rolling contract).

81. *Grosvenor v. Qwest Commc’ns Int’l, Inc.*, No. 09-cv-2848, 2010 WL 3906253, at \*8–10 (D. Colo. Sept. 30, 2010).

82. *Id.* at \*8.

without much sympathy for, or even inquiry into, the facts that might give rise to procedural unconscionability. Most courts have surrendered to the precedent for enforcing venue requirements, arbitration clauses, and rolling contracts. Courts uniformly enforce clickwraps, and most do not even discuss the characteristics of the particular contract or the particular consumer's abilities. Those that do almost always dismiss claims of procedural unconscionability. Courts enforce browsewraps if the link to the terms is reasonably visible without requiring scrolling down on the webpage. Increasingly, courts enforce browsewraps without addressing visibility.

Given the difference in context between paper contracts and online contracts, the traditional tests of procedural unconscionability should be taken particularly seriously. Moreover, considering the sheer quantity of transactions requiring contracts as well as the size and density of electronic contracts, courts should reconsider the fundamental concept that any contract is enforceable if a party only has notice terms exist. Even with notice that terms exist, a reasonable consumer will not read and respond in market measurable ways. As a study by Professor Florencia Marotta-Wurgler makes clear, online users recognize that attempting to read online contracts is futile.<sup>83</sup> Consumers cannot feasibly read and respond to wrap contracts in meaningful ways.

## II. TO READ OR NOT TO READ

Even if Internet users are aware that there are contract terms somewhere, reading them is downright unwise under current law. This Part explains why, beginning with the practical reasons, including the unreadability of most wraps. This Part then discusses the legal incentives to avoid reading.

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83. See Florencia Marotta-Wurgler, *Will Increased Disclosure Help? Evaluating the Recommendations of the ALI's "Principles of the Law of Software Contracts,"* 78 U. CHI. L. REV. 165, 168 (2011) (reporting on an extensive study that demonstrated that requiring affirmative clicks to accept wrap contracts does not result in any significant increase in the number of consumers who read them). Professor Marotta-Wurgler explains that "[t]he clearest policy implication is that increased disclosure is no panacea. Disclosure is but a necessary condition for readership. It appears that the cost of *accessing* the contract is not the issue; rather [the issue] is the expected benefit from *reading* it." *Id.*

A. *Wrap Contracts are Unreadable*

A policy that depends on users actually reading all of the wrap contracts on websites they use would be inefficient. Professor Kim described the time drain this way:

One study estimated that it would cost the average American Internet user 201 hours or the equivalent of \$3,534 a year to read the privacy policies of each website that he or she visits. . . . [Y]ou would not have time to engage in productive work, recreational activities, or relationships. Modern life, in other words, would break down if we treated wrap contracts just like other contracts.<sup>84</sup>

In addition to time drain, a second reason not to read wrap contracts is that they are difficult, dense texts. Most readers cannot be expected to comprehend them even if they read every word. Wrap contracts are increasingly elaborate, monotonous, and written in ways that suggest the drafter intended to obfuscate the scariest parts by embedding them in excess verbiage and repetition.<sup>85</sup> Remember, wrap contract drafters do not have to worry about printer or paper costs, mailing or storage costs, or the cautionary impact of presenting a long paper contract to a consumer in its obvious fullness. Key sections in wrap contracts are frequently presented in all capital letters, but that does not help.<sup>86</sup> It seems unlikely that the drafters do not realize that this is the most difficult form of text to read because the absence of high-and-low letter patterns vastly decreases comprehension.<sup>87</sup> Capital letters might draw attention to a paragraph (if a user scrolled down far enough) but they obscure the meaning of the paragraph.

A third reason not to read a wrap contract is that they are nonnegotiable. Even if the user has the expertise to snatch the legal

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84. KIM, *supra* note 9, at 213 (citation omitted).

85. *See infra* Part III (detailing examples of changes that should be implemented to improve wrap jurisprudence).

86. *But see supra* notes 42, 46, and *infra* note 87 and accompanying text (discussing how capital letters may affect the enforceability of online contracts).

87. This effect is well understood by drafters.

All-capital print greatly retards speed of reading in comparison with lower-case type. Also, most readers judge all capitals to be less legible. Faster reading of the lower-case print is due to the characteristic word forms furnished by this type. This permits reading by word units, while all capitals tend to be read letter by letter. Furthermore, since all-capital printing takes at least one-third more space than lower case, more fixation pauses are required for reading the same amount of material. The use of all capitals should be dispensed with in every printing situation.

MILES A. TINKER, LEGIBILITY OF PRINT 65 (1963).

significance out of the morass of a wrap contract, the user will have few practical options. An economist would argue that a potential user can then “shop around,” but this is of little practical benefit. First, all of the other service providers likely have a very similar wrap contract.<sup>88</sup> Second, if one’s family, friends, and business associates are on Facebook, for example, using a competitor’s service is not a reasonable choice. Professor Eric Goldman, an avid defender of wrap contracts,<sup>89</sup> points out that “a site with strong lock-in effects like Facebook is relatively immune from widespread terminations.”<sup>90</sup> A “lock-in effect” arises when consumers are basically locked into a particular service or product because the costs of making a change are prohibitive, either in terms of money or, as with Facebook, in terms of severing associations to start over on another media site that does not include one’s family and friends.<sup>91</sup>

A fourth reason not to read wrap contracts is that the legal consequences are frequently obscure to anyone without a legal education. Even with a law degree, the implications of some terms would be unknown to all but a few contract experts. A brave soul who tracks carefully through a wrap contract may not have the background or sophistication needed to evaluate what it means to assent to clauses stated even with common legal terms, such as requiring mandatory one-sided arbitration, limiting venue selection, or waiving a jury, class actions, or all forms of damages. Damage waivers might be interpreted as waiving only extreme recoveries when in fact they likely waive *every* known form of damages. How many law

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88. See RADIN, *supra* note 12, at 40–41 (noting that some products come from only one supplier, and that differing suppliers may imitate the terms used by others: “[o]nce one tour company deploys a form purporting to exculpate itself from all kinds of liability for any injury . . . forms with almost identical wording pop up everywhere”).

89. See Eric Goldman, *How Zappos’ User Agreement Failed in Court and Left Zappos Legally Naked*, TECH. & MARKETING L. BLOG (Oct. 29, 2012), [http://blog.ericgoldman.org/archives/2012/10/how\\_zappos\\_user.htm](http://blog.ericgoldman.org/archives/2012/10/how_zappos_user.htm) (referring to Zappos’ “legally irrelevant” contract that the court would not uphold). For example, Professor Goldman said “[a]voiding this outcome is surprisingly easy. Use clickthrough agreements, not browsewraps, and remove any clauses that say you can unilaterally amend the contract.” *Id.*

90. Eric Goldman, Comment to *Court Rules that Kids Can Be Bound by Facebook’s Member Agreement*, TECH. & MARKETING L. BLOG (Apr. 4, 2014), <http://blog.ericgoldman.org/archives/2014/04/court-rules-that-kids-can-be-bound-by-facebooks-member-agreement.html>.

91. See, e.g., Animesh Ballabh, *Antitrust Law: An Overview*, 88 J. PAT & TRADEMARK OFF. SOC’Y 877, 884 (2006) (describing the “lock-in” effect in antitrust law, where the costs of changing will be substantial).

students realize what it means to incorporate the law of Texas or West Virginia under which waivers of gross negligence may be enforceable?<sup>92</sup> Using market competition to solve the problem would require lay consumers to take the time to find and read wrap contracts, and to understand the language and its legal implications. That is simply not plausible.

A final reason for not reading wraps is that the text, on its face, may be misleading and stop users from seeking relief to which they may be entitled. Wrap contracts frequently include disclaimers that actually are unenforceable, and that the drafters know are unenforceable, but are included anyway.<sup>93</sup> For instance, drafters often attempt to disclaim liability for personal injury resulting from a defect in a tangible, movable item, but, with respect to a consumer, this is the one thing the Uniform Commercial Code (UCC) makes *prima facie* unconscionable.<sup>94</sup> Consumers who read wraps or call the company, either before entering the contract or after suffering injury, may well accept without question the company’s statement that they have waived all claims to relief. Some wraps claim that upon default the other party can seize property even if the defaulter has

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92. See, e.g., *Valero Energy Corp. v. M.W. Kellogg Constr. Co.*, 866 S.W.2d 252, 257–58 (Tex. App. 1993) (“Parties may agree to exempt one another from future liability for negligence so long as the agreement does not violate the constitution, a statute, or public policy.”); *Murphy v. N. Am. River Runners, Inc.*, 412 S.E.2d 504, 508–09 (W. Va. 1991) (“[A] plaintiff who *expressly* and, under the circumstances, *clearly* agrees to accept a risk of harm arising from the defendant’s . . . reckless conduct may not recover for such harm, unless the agreement is invalid as contrary to public policy. When such an express agreement is freely and fairly made, between parties who are in an equal bargaining position, and there is no public interest with which the agreement interferes, it generally will be upheld.” (citation omitted)); W. PAGE KEETON ET AL., *PROSSER AND KEETON ON THE LAW OF TORTS* § 68 (5th ed. 1984) (finding that a contract to assume risk is valid unless it meets a specific exception); 3 STUART M. SPEISER ET AL., *THE AMERICAN LAW OF TORTS* § 12:48 (2008) (same); 8 SAMUEL WILLISTON & RICHARD A. LORD, *A TREATISE ON THE LAW OF CONTRACTS* § 19:19 (4th ed. 2014) [hereinafter *WILLISTON ON CONTRACTS*] (reporting that contracts that indemnify against tortious conduct are valid so long as they do not violate public policy). In other states, such as New York, waivers of intentional or grossly negligent acts are not enforceable. See *Gross v. Sweet*, 400 N.E.2d 306, 309 (N.Y. 1979) (“To the extent that agreements purport to grant exemption for liability for willful or grossly negligent acts they have been viewed as wholly void.”).

93. See, e.g., Charles A. Sullivan, *The Puzzling Persistence of Unenforceable Contract Terms*, 70 OHIO ST. L.J. 1127, 1134–37 (2009) (noting that an unenforceable clause may be included because of the assumption of the other party’s sense of honor and lack of knowledge about the law, or as a deterrent to violations).

94. U.C.C. § 2-719(3) (2011) (“Consequential damages may be limited or excluded unless . . . for injury to the person in the case of consumer goods . . .”).

filed bankruptcy, which the drafter surely knows is barred by bankruptcy law's automatic stay.<sup>95</sup> Other common terms, such as a waiver of intentionally caused harm, are unenforceable in most jurisdictions.<sup>96</sup> Wrap contracts typically are not customized to carve out provisions unenforceable in a particular user's jurisdiction. Some wraps may include a provision several pages down that recites that some terms may be unenforceable in some jurisdictions, but gives no hint of which terms or which jurisdictions.<sup>97</sup> Further, consumers without access to Westlaw or LexisNexis may have trouble researching the statutory and case law in their jurisdictions.

These and other *in terrorem* clauses accomplish their desired effect if they so discourage the reader that he or she gives up before taking any action.<sup>98</sup> Professor Jason Scott Johnston argues, in defense of

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95. *Ipso facto* clauses, provisions that dissolve or modify a debtor's interest in property upon filing for bankruptcy, are generally unenforceable. The U.S. Bankruptcy Code includes 11 U.S.C. § 365(e), which invalidates *ipso facto* clauses in most executory contracts; 11 U.S.C. § 541(c)(1)(B), which invalidates *ipso facto* clauses that would cause forfeitures; and 11 U.S.C. § 363(l), which invalidates *ipso facto* clauses that would limit the trustee's ability to deal with property of the estate. See, e.g., Emil A. Kleinhaus & Peter B. Zuckerman, *The Enforceability of Ipso Facto Clauses in Financing Agreements: American Airlines and Beyond*, 23 NORTON J. BANKR. L. & PRAC. 193, 195 (2014); Paul Rubin, *Not Every Ipso Facto Clause Is Unenforceable in Bankruptcy*, AM. BANKR. INST. J., Aug. 2013, at 12; Bruce H. White & William L. Medford, *Ipso Facto Clauses and Reality: I Don't Care What the Documents Provide*, AM. BANKR. INST. J., Apr. 2002, at 28. Notwithstanding a waiver in a contract, 11 U.S.C. §§ 361–62 stops creditors from seizing and liquidating their collateral in a Chapter 11.

96. See, e.g., *Flood v. Young Woman's Christian Ass'n of Brunswick, Ga., Inc.*, 398 F.3d 1261, 1266 (11th Cir. 2005) (applying Georgia law, which does not allow a party to exempt itself from gross negligence); *Royal Ins. Co. of Am. v. Sw. Marine*, 194 F.3d 1009, 1016 (9th Cir. 1999) (barring parties to a maritime contract from shielding themselves from gross negligence, which ruling is consistent with the First and Fifth Circuits); *S.F. Residence Club, Inc. v. Baswell-Guthrie*, 897 F. Supp. 2d 1122, 1210 (N.D. Ala. 2012) (noting that under Alabama law, a clause that releases a party from "wanton or intentional misconduct is not enforceable"); *Hartford Ins. Co. v. Holmes Prot. Grp.*, 673 N.Y.S.2d 132, 133 (App. Div. 1998) (explaining that under public policy, clauses waiving gross negligence are unenforceable).

97. See, e.g., *Conditions of Use*, AMAZON.COM, [http://www.amazon.com/gp/help/customer/display.html/ref=footer\\_cou?ie=UTF8&nodeId=508088](http://www.amazon.com/gp/help/customer/display.html/ref=footer_cou?ie=UTF8&nodeId=508088) (last updated Dec. 5, 2012) ("CERTAIN STATE LAWS DO NOT ALLOW LIMITATIONS ON IMPLIED WARRANTIES OR THE EXCLUSION OR LIMITATION OF CERTAIN DAMAGES. IF THESE LAWS APPLY TO YOU, SOME OR ALL OF THE ABOVE DISCLAIMERS, EXCLUSIONS, OR LIMITATIONS MAY NOT APPLY TO YOU, AND YOU MIGHT HAVE ADDITIONAL RIGHTS.").

98. Sullivan, *supra* note 93, at 1128–29.

Contracts frequently contain clauses that are not enforceable—at least, not enforceable as written. . . . It is possible . . . that such clauses are



wrap contracts, that customers will call the business in response to harsh terms in the wraps.<sup>99</sup> The business may then make individualized determinations of which customers are worth saving.<sup>100</sup> If the caller appears to be a “desirable” customer, the administrator who answers such calls can waive contract terms for individual cases.<sup>101</sup> If used enough in the industry to be relevant, this is a practice that would waste all of the time saved by the use of non-negotiable terms as administrators shuffle through individual callers. More importantly, drafters know that most customers will believe what is written or what the administrator says is written in the contract. Only the truly obstreperous, and those with excess time and ability to articulate, will pursue a complaint far enough for the chance at an exception. This practice would have an undesirable result of rewarding that behavior and punishing the less aggressive.

In addition to these overwhelming practical limitations, the law itself disincentivizes reading elaborate contract terms, as will be discussed later. The best advice to clients, neighbors, and friends is to never read them. They will not understand, and the attempt could come back to bite them.

### B. Readability Illustrations

To illustrate the gross inefficiency and futility of expecting consumers to find, open, read, and comprehend wrap contracts, I offer some examples of what a user might find behind a hyperlink.

#### 1. The PDF Annotator example

Grahl Software Design’s “Terms of License for PDF Annotator,”<sup>102</sup> its flagship consumer software,<sup>103</sup> provides an example of a typically

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mistakes . . . [I]t seems certain that invalid terms continue to be used by those who are well aware that they are unenforceable as written, presumably because they have utility for those who impose them. The most obvious reason is that the other party to the contract (or, conceivably, some third party) does not realize the clause is unenforceable as written or is unwilling to risk the resources needed to establish its invalidity.

*Id.* (footnotes omitted).

99. Jason Scott Johnston, *Cooperative Negotiations in the Shadow of Boilerplate*, in *BOILERPLATE: THE FOUNDATION OF MARKET CONTRACTS* 12, 12 (Omri Ben-Shahar ed., 2007).

100. *Id.* at 14.

101. *Id.*

102. Grahl Software Design, *Terms of License for PDF Annotator*, <http://www.ograhl.com/pdfannotator/std/en/License.txt> (last revised July 28, 2014) [hereinafter Grahl Wrap Contract].

incomprehensible wrap contract, which contains vast redundancies, inconsistent waivers, and terms that seem entirely irrelevant to the transaction. These characteristics, common to many wrap contract agreements, are a function of both the lack of physical space constraints and the knowledge that consumers rarely read such agreements. In addition, the extreme language may both deter efforts to read, and serve an *in terrorem* effect on a user, ultimately leading the user to believe there is no recourse after a breach.

Grahl users may follow the link to see a long chunk of text in all caps. In ninety-five words in the first of three waiver paragraphs, Grahl states that:

IN NO EVENT WILL [IT] BE LIABLE TO ANY PARTY (a) FOR ANY INDIRECT, SPECIAL, PUNITIVE, INCIDENTAL OR CONSEQUENTIAL DAMAGES (INCLUDING, BUT NOT LIMITED TO, DAMAGES FOR LOSS OF BUSINESS PROFITS, BUSINESS INTERRUPTION, LOSS OF PROGRAMS OR INFORMATION, AND THE LIKE), OR ANY OTHER DAMAGES ARISING IN ANY WAY OUT OF THE AVAILABILITY, USE, RELIANCE ON, OR INABILITY TO USE THE SOFTWARE, THE GRAHL SERVICES AND INFORMATION, VARIOUS DIRECTORIES AND LISTINGS OR ANY OTHER 'INFORMATION', EVEN IF GRAHL SHALL HAVE BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES, AND REGARDLESS OF THE FORM OF ACTION, WHETHER IN CONTRACT, TORT, OR OTHERWISE . . . .<sup>104</sup>

The program does not actually include any directories, listings, information, or for that matter “information” with quotes (since both are in the list), but maybe it pays to be inclusive. The paragraph then tacks on another waiver of liability: “(b) FOR ANY CLAIM ATTRIBUTABLE TO ERRORS, OMISSIONS, OR OTHER INACCURACIES IN, OR DESTRUCTIVE PROPERTIES OF ANY INFORMATION.”<sup>105</sup> One would think this would do the job.

The next paragraph states that “THE SOFTWARE IS PROVIDED AS IS WITHOUT WARRANTY OF ANY KIND.”<sup>106</sup> But why stop there? “GRAHL FURTHER DISCLAIMS ALL WARRANTIES, INCLUDING WITHOUT LIMITATION ANY IMPLIED

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103. This program shows 66,843,271 downloads and 5-star editor rating on cnet.com, as of March 30, 2015. CNET.COM, [http://download.cnet.com/1770-20\\_4-0.html?query=PDF+annotator&platform=Windows&searchtype=downloads](http://download.cnet.com/1770-20_4-0.html?query=PDF+annotator&platform=Windows&searchtype=downloads) (last visited Mar. 30, 2015).

104. Grahl Wrap Contract, *supra* note 102, ¶ 2.

105. *Id.*

106. *Id.* ¶ 3.

WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, AND NONINFRINGEMENT.”<sup>107</sup> To make that clear, it adds: “THE ENTIRE RISK ARISING OUT OF THE USE OR PERFORMANCE OF THE PRODUCT AND DOCUMENTATION REMAINS WITH RECIPIENT.”<sup>108</sup> Next the contract includes another waiver *nearly* identical to the prior paragraph, with the main distinction being that, in this litany, Grahl remembers to add “DIRECT” to the list of damages, although the phrase “OTHER DAMAGES” in both ought to suffice.<sup>109</sup> This seventy-three word waiver refers to the product instead of services and information,<sup>110</sup> as above, but those could have been combined.

Most bizarrely, in a third all-caps paragraph, this time eighty-three words long, Grahl notes that the program is “NOT . . . INTENDED FOR USE IN HAZARDOUS ENVIRONMENTS REQUIRING “FAIL-SAFE” PERFORMANCE.”<sup>111</sup> Grahl then expressly waives liability for use of the program in the

OPERATION OF NUCLEAR FACILITIES, AIRCRAFT NAVIGATION OR COMMUNICATION SYSTEMS, AIR TRAFFIC CONTROL, WEAPONS SYSTEMS, DIRECT LIFE-SUPPORT MACHINES, OR ANY OTHER APPLICATION IN WHICH THE FAILURE OF THE SOFTWARE COULD LEAD DIRECTLY TO DEATH, PERSONAL INJURY, OR SEVERE PHYSICAL OR PROPERTY DAMAGE (COLLECTIVELY, “HIGH RISK ACTIVITIES”). GRAHL EXPRESSLY DISCLAIMS ANY EXPRESS OR IMPLIED WARRANTY OF FITNESS FOR HIGH RISK ACTIVITIES.<sup>112</sup>

This waiver is perplexing considering the software, PDF Annotator, is tablet-based software that enables the user to highlight, notate, and digitally stamp PDF documents.<sup>113</sup> It is difficult to imagine any use of PDF Annotator that would make it relevant in any way to a nuclear facility or a life-support machine. If the program were considered “goods” under the UCC, of course, a waiver of liability for physical injury would not be enforceable against a consumer,<sup>114</sup> but how many

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107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.* ¶ 4.

112. *Id.*

113. PDF ANNOTATOR, <http://www.pdfannotator.com/en> (last visited Mar. 30, 2015).

114. Under U.C.C. § 2-105 (2001), “goods” includes all things that are movable and tangible. Although the valuable feature of software is intellectual property, and thus intangible, some of the first courts confronted with software analogized them to books, which have as a matter of tradition been treated as goods and which can be

users would know that? Consistent with treating the program as a good, the waivers cover a “warranty of fitness,” a UCC term, although, even if the UCC were found to apply to downloadable software,<sup>115</sup> this warranty would only be relevant if the purchaser engaged with a representative of the company who knew of the user’s unique circumstances and made a recommendation of this program from a range of available programs. However, it costs Grahl nothing to include all of this, so why take it out? One would think that lawyers are still being paid by the word.

Finally, if a PDF Annotator user actually has some claim that survives this onslaught of waivers, the court of jurisdiction for commercial users is Landshut, Germany.<sup>116</sup> Unfortunately, the wrap contract does not identify German law as the choice of law for consumers.<sup>117</sup> Under European Union law applicable in Germany, most of these provisions would be unenforceable, at least against a consumer.<sup>118</sup>

## 2. *The Amazon example*

Another example is the Amazon.com Conditions of Use, which is a 3,437-word, eight page (single-spaced in Times New Roman font 12)

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distinguished in that the tangible medium by which they are conveyed is also the means of using the intangible value. DEBORAH BOUCHOUX, *INTELLECTUAL PROPERTY: THE LAW OF TRADEMARKS, COPYRIGHTS, PATENTS, AND TRADE SECRETS* 282 (3d ed. 2009). The comments to the 2003 proposed revision to Uniform Commercial Code (UCC) Article 2, sections 2-103 and 2-105 expressly excluded downloadable software from the definition of goods. U.C.C. §§ 2-103 & cmt.; 2-105 & cmt. (Proposed Final Draft 2003) (proposing to remove from the definition of “goods” “information not associated with goods”). The drafters could not reach sufficient consensus to address software that was embodied in a tangible disk, although the predominant purpose test and gravamen test for mixed goods and non-goods contexts would likely both exclude from the application of the UCC software on a disk. The 2003 revision was not adopted, so ambiguity still exists about the status of software under the UCC. The PDF Annotator program is downloadable and has no physical element and thus should not be subject to the UCC.

115. See also the discussion in *Conwell v. Gray Loon Outdoor Marketing Group*, 906 N.E.2d 805, 811–12 (Ind. 2009). In addition, UCC Article 2 covers “sales” and, under section 2-106, a “sale” consists in the passing of title from the seller to the buyer. U.C.C. § 2-106(1) (2000). This seems clearly to exclude a license to use software.

116. Grahl Wrap Contract, *supra* note 102, ¶ 10.

117. The Grahl Wrap Contract does not specify the choice of law that governs, however, it does assert that the software is protected by copyright laws and intellectual property laws, and the related foreign treaties. *Id.* ¶¶ 3, 6.

118. See Michael L. Rustad & Maria Vittoria Onufrio, *Reconceptualizing Consumer Terms of Use for a Globalized Knowledge Economy*, 14 U. PA. J. BUS. L. 1085, 1088 (2012) (noting that “substantive contract terms in social networking sites and software licenses clash with mandatory substantive consumer rules in the Eurozone”).

document. It is a browsewrap that purports to be binding when “you visit or shop at Amazon.com.”<sup>119</sup> Several paragraphs down is the “DISCLAIMER OF WARRANTIES AND LIMITATION OF LIABILITY,” comprising 268 words in all caps.<sup>120</sup> It includes (twice in the first paragraph): “THE AMAZON SERVICES AND ALL INFORMATION, CONTENT, MATERIALS, PRODUCTS (INCLUDING SOFTWARE) AND SERVICES INCLUDED ON OR OTHERWISE MADE AVAILABLE TO YOU THROUGH THE AMAZON SERVICES”; and, with various redundancies, it also waives all claims and warranties.<sup>121</sup> Does this mean that all products purchased on Amazon come without a warranty? Yes, at least as to Amazon itself. It concludes: “YOU EXPRESSLY AGREE THAT YOUR USE OF THE AMAZON SERVICES IS AT YOUR SOLE RISK.”<sup>122</sup> Apparently, Amazon is, in fact, fairly gracious in accepting returns of defective products, but it could not be required to if its Conditions of Use were invoked.

Apparently all of the language in the first paragraph is insufficient, so the second paragraph begins with an express waiver of all warranties, including, without limitation, the warranties of merchantability and fitness for a particular purpose, both with respect to the same list of items.<sup>123</sup> The next sentence reiterates that Amazon does not warrant that the site, its services, or electronic communications from it (among other things) will be free from “VIRUSES OR OTHER HARMFUL COMPONENTS.”<sup>124</sup> It then states that “AMAZON WILL NOT BE LIABLE FOR ANY DAMAGES OF ANY KIND ARISING FROM THE USE OF” the site or anything possibly connected to the site, “INCLUDING, BUT NOT LIMITED TO DIRECT, INDIRECT, INCIDENTAL, PUNITIVE, AND CONSEQUENTIAL DAMAGES.”<sup>125</sup> After many years as a contract professor, I cannot think of any other kind of damages.

Improving on most wrap contracts, the third paragraph in the section, titled “Disclaimer of Warranties and Limitations of Liability,” states that some states may not allow the application of some of the

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119. *Conditions of Use*, *supra* note 97 (emphasis added).

120. *Id.*

121. *Id.* The only difference in the two phrases is that the second starts “THE AMAZON SERVICES, OR THE INFORMATION . . .” *Id.* (emphasis added).

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.*

above disclaimers to certain users.<sup>126</sup> This at least gives a reader notice that further investigation may be warranted, rather than the complete surrender suggested by the lengthy, repetitive disclaimers. However, few will or can read through so many capitalized words before losing focus. Next comes a reasonably understandable statement of the mandatory arbitration requirement.<sup>127</sup> Amazon can afford to be generous and clear in this statement, however, as there can be nothing left to arbitrate.

C. *The Perverse Disincentive of the Duty to Read Rule*

Courts are not inclined to police wrap contracts, and, when tempted to do so in a particular case, the court's sense of mercy tends to melt should the party admit to having read any part of it. In this subpart, I set the context by explaining how the wrap contract may warrant a reanalysis of the application of contract doctrines. I then discuss how contract doctrines punish reading and the duty to read rule.

1. *One stretch too far*

A classic World War II movie recounts the failed effort of Allied troops to capture a bridge at Arnhem, Netherlands.<sup>128</sup> After a brilliant airborne drop and the acquisition of the Nijmegen bridge, everything falls apart. Allegedly, British Lieutenant-General Frederick Browning told Field Marshal Bernard Montgomery, the operation's architect: "I think we might be going a bridge too far."<sup>129</sup> A controversial and complex contract doctrine that has actually succeeded in other contexts may stretch on bridge too far when applied in additional contexts.

In the last century, adhesion contracts requiring little or no overt evidence of assent became acceptable, subject to judicial discretion to avoid abuses.<sup>130</sup> Preprinted forms became a norm, but the forms contained limited text because of their size and were policed by doctrines such as unconscionability and reasonable expectations. As judicial policing has weakened,<sup>131</sup> the online context has given

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126. *Id.*

127. *Id.*

128. A BRIDGE TOO FAR (United Artists 1977) (based on Cornelius Ryan's 1974 book adapted by William Goldman).

129. CORNELIUS RYAN, A BRIDGE TOO FAR 89 (1974).

130. Preston & McCann, *supra* note 14, at 168–69.

131. See Cheryl B. Preston, *CyberInfants*, 39 PEPP. L. REV. 255, 258–62 (2012) (discussing the lack of judicial pressure on businesses regarding adhesion contracts).

businesses a cost-free way to attach extraordinarily long, complex, and one-sided terms to transactions that in the paper world were governed only by the default provisions of the UCC.<sup>132</sup>

Professor Kim argues that the rationales for the broad acceptance of adhesive contracts fail in the online context.<sup>133</sup> The lack of precautionary signals accompanying contracts online has two significant implications. The first is obvious: online consumers are not aware of the extent to which they are bound to elaborate terms and so fail to push back.<sup>134</sup> The second is more important: real world providers of services and products shy away from elaborate terms because of the ways in which they would increase customer resistance and thus increase the costs of doing business.<sup>135</sup> Because these restraints on businesses are absent online, businesses succumb to the temptation to throw in much longer and more complex terms in more kinds of transactions than they can in a paper world.

Professor Kim’s book describes various factors that make wrap contracts uniquely dangerous.<sup>136</sup> I agree with her list of distinctions, and add some additional reasons why online consumption is different. E-commerce is very informal and quick. When visiting a website, a consumer does not need to get dressed, drive to a store, or stand in line to check out. There is nothing on a website that works to slow the urge for instant gratification. Transactions can be completed without any serious thought and consumers may sign up for products or services they believe are free or cheap without any concept that legal obligations are involved. Although a user can, in theory, explore a website for an unlimited time before making a purchasing decision, few actually do. A website does not put users in a room with an employee presenting a multipage document to whom questions can be directed and resistance can be expressed. Other customers need not wait while the sales clerk tries to justify an

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132. See U.C.C. § 2-326(1) (“[u]nless otherwise agreed”); *id.* § 2-327(1) (“unless otherwise agreed”).

133. See KIM, *supra* note 9, at 162 (arguing that judges would fail basic classes in contracts when they “borrow phrases from one case and transport them to another without regard for the context,” such as with online agreements); see also Preston & McCann, *supra* note 14, at 134 (delineating the differences between paper adhesion contracts and online adhesion contracts).

134. See KIM, *supra* note 9, at 164–65 (explaining that wrap contracts often include complicated terms and require blanket assent achieved through a single click).

135. See *id.* (describing that companies are not afraid to include extreme terms in wrap contracts).

136. See *id.* at 162 (explaining that wrap contracts are not likely to be read and can involve underaged consumers).

onerous contract. Ultimately, the sales clerk likely cannot negotiate any changes, but the cost of providing a forum for consumer concern induces businesses to make terms shorter, simpler, and fairer. For these reasons, merchants impose elaborate contractual terms much less frequently in the physical shopping world.

Even in those cases where a multipage contract is required in the paper world, the actions of seeing the formal print, sensing the contract's weight or length, and affixing one's signature are cautionary in ways an online contract is not. Kim disputes the claim that following a hyperlink "simply takes a person to another page of the contract, similar to turning the page of a written paper contract' . . . [because] turning a page is a naturally flowing, progressive act whereas clicking on a hyperlink is a disruptive activity."<sup>137</sup> Flipping through a paper in one's hand is more natural than scrolling down or up to find a link and taking the diversion to another page before going forward.

Finally, the nature of Internet use allows more powerful parties to intentionally reduce the chances of the user reading and comprehending a long, technical document. Blanket assent is senseless when companies use too many scattered, weightless terms and design contracts that go unnoticed.<sup>138</sup> The legally-significant differences in the context of online contracting have been noted by the Federal Trade Commission:

[M]any online consumers exhibit certain characteristics, including inattention, unwarranted confidence, exuberance, and a desire for immediate gratification, which make them less likely to see and read disclosures . . . . [A]s result of these online characteristics, consumers become 'click-happy' and quickly navigate through webpages, without paying much attention because they believe nothing will go wrong and want to complete the transaction as rapidly as possible. As a result, consumers often do not read or understand the terms . . . .<sup>139</sup>

As a result of these factors, drafters can reliably assume that almost no one reads the contract terms.<sup>140</sup> I agree with Professor Kim that various wrap layouts suggest that "companies intentionally design

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137. *Id.* at 162 (footnote omitted) (quoting *Hubbert v. Dell Corp.*, 835 N.E.2d 113, 121 (Ill. App. Ct. 2005)).

138. *Id.* at 200.

139. FED. TRADE COMM'N, *NEGATIVE OPTIONS: A REPORT BY THE STAFF OF THE FTC'S DIVISION OF ENFORCEMENT* ii–iii (2009). The FTC is aware of these risks but has taken no steps to require business practices that mitigate the opportunities for abuse.

140. Kim, *supra* note 9, at 122 ("[I]t simply does not matter whether the consumer has read the terms—the assumption . . . is that she will not have done so.").



contracts to escape user attention.”<sup>141</sup> Additionally, as I discuss further below, even if consumers read the terms, their opportunity to reject certain terms or choose other suppliers is basically nonexistent.<sup>142</sup>

Thus, the law’s approach to adhesion contracts that developed over the last century becomes so much more tenuous and fictional online. The context in cyberspace is different, and the law should account for the increased opportunity for abuses.<sup>143</sup> Because of the significantly weaker forms of notice online and because of the significantly longer and more complex terms online, consumers cannot be expected to read and comprehend these contracts. The presumption that they may be bound without reading becomes increasingly unfair.

Something is lost in translating the law developed in a more judicially activist climate that applied to standard pre-printed forms consisting of a few lines on the back of a receipt to the tomes that hide behind a hyperlink. As Chief Judge Shepherd said, when confronted with a software issue, “when courts try to pour new wine into old legal bottles, we sometimes miss the nuances.”<sup>144</sup>

## 2. *Scope of the duty to read rule*

The duty to read rule has many positive aspects. By imposing the duty to read, courts simultaneously protect the drafting party from being blindsided by the other party’s negligence, while also encouraging the non-drafting party to become familiar with the terms so that the objective action of signing the contract accurately reflects the non-drafting party’s subjective intent. Any kind of exception to this duty to read rule comes with some risk of a perverse incentive. Courts are generally justified in saying that Jill may not dispute a

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141. *Id.* at 200.

142. *Id.* at 122.

143. *See* Preston & McCann, *supra* note 14, at 164 (suggesting that courts have disregarded basic principles of contract formation and ignore the “violence [of adhesion contracts] to core private law assumptions of free and knowing choice”).

144. *Conwell v. Gray Loon Outdoor Mktg. Grp.*, 906 N.E.2d 805, 812 (Ind. 2009); *see also* *Serenity Springs, Inc. v. LaPorte Cnty. Convention & Visitors Bureau*, 13 N.E.3d 487, 494 (Ind. Ct. App. 2014).

[P]rinciples . . . were enunciated in a time when men drove a cart and horse and life proceeded more slowly but they are difficult to apply to an era where messages can be sent at the speed of light and goods can be purchased by the push of a button. Although it is ‘frequently feasible to pour new wine into old legal bottles,’ here, the old rule—albeit still valid—simply cannot keep up with the modern advances in technology.

*Id.* (quoting *Felscher v. Univ. of Evansville*, 755 N.E.2d 589, 599 (Ind. 2001)).

clause in a contract with Jack because she could have taken action before formation if she had read the contract and discovered the clause. The law should encourage sober, adult parties to be diligent in protecting themselves rather than burdening the court system after the fact. But perhaps an exception should be found if Jill is justified in not reading the contract.

So far, only two significant exceptions to the duty to read rule exist. The most developed exception applies in fraudulent inducement cases.<sup>145</sup> The fraudulent inducement exception may cover cases where the fraud victim was grossly negligent in failing to read.<sup>146</sup> The Fifth Circuit explained that, when “an individual who imprudently executes a contract without reading it . . . [and] signs a contract in reliance upon fraudulent misrepresentations as to its contents,” the court is willing to override even the “gross negligence” of failing to read, so it can address the more serious fraud problem.<sup>147</sup> In *White v. Union Producing Co.*,<sup>148</sup> the non-reader “had the right to rely upon the representations made to her . . . although the means of correct information were within reach.”<sup>149</sup> A 2003 federal court in Mississippi praised the duty to read rule by stating that to allow someone to admit that he signed a contract but did not read or understand it would “absolutely destroy the value of all contracts.”<sup>150</sup> But in almost the next breath, the court determined that the failure to read in that case was no longer problematic once the other party is shown to be guilty of fraudulent inducement.<sup>151</sup>

Notwithstanding strong language in some cases, the failure to read may bar recovery even if fraud is alleged.<sup>152</sup> In theory, the fraudulent

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145. 27 WILLISTON ON CONTRACTS, *supra* note 92, § 69:35 (“[I]f a party has fraudulently misrepresented a document’s contents or induced the other party to refrain from reading the document, courts will allow a remedy, choosing not to permit a positively fraudulent party to prosper because of the stupidity or credulity of the defrauded party, subject only to the rights of innocent third parties. In short, the law should not give any assistance to a knave, a scoundrel or a con artist who preys upon the less alert or more naive members of society.” (footnotes omitted)).

146. *But see id.* (“[C]ourts typically will not grant relief when simply reading the written instrument would settle the issue.”).

147. *White v. Union Producing Co.*, 140 F.2d 176, 178 (5th Cir. 1944).

148. *Id.*

149. *Id.* at 178.

150. *Anderson v. Equitable Life Assurance Soc’y of the United States*, 248 F. Supp. 2d 584, 590 (S.D. Miss. 2003) (quoting *Turner v. Terry*, 799 So. 2d 25, 36 (Miss. 2001)).

151. *Id.* at 591.

152. *See, e.g., Regensburger v. China Adoption Consultants, Ltd.*, 138 F.3d 1201, 1207 (7th Cir. 1998) (“A party who could have discovered the fraud by reading the contract, and in fact had an opportunity to do so, cannot later be heard to complain

inducement “rule[s] operate[] on innocent as well as intentional misrepresentations.”<sup>153</sup> Where a misrepresentation is negligent, however, some courts find it insufficient to overcome an integration clause, and thus evidence of the misrepresentation cannot even be admitted.<sup>154</sup> In addition, a court may find that entering a contract without reading its terms to be so unreasonable that it negates reliance on the other party in an arm’s length transaction notwithstanding the other party’s misrepresentations.<sup>155</sup> When the

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that the contractual terms bind her.”); *Anderson*, 248 F. Supp. 2d at 591 (quoting *Godfrey, Bassett & Kuykendall Architects, Ltd. v. Huntington Lumber & Supply Co.*, 584 So. 2d 1254, 1259 (Miss. 1991)) (failure to read a contract possibly is negligence); *Gardiner v. McDaniel*, 415 S.E.2d 303, 304 (Ga. Ct. App. 1992) (“[I]n the absence of special circumstances one must exercise ordinary diligence in making an independent verification of contractual terms and representations, failure to do which will bar [a defense] based on fraud.” (second alteration in original) (quoting *Moran v. NAV Servs.*, 377 S.E.2d 909 (Ga. Ct. App. 1989))); *Belleville Nat’l Bank v. Rose*, 456 N.E.2d 281, 284 (Ill. App. Ct. 1983) (“The defense of fraud is, in most situations, unavailable to avoid the effect of the written agreement where the complaining party could have discovered the fraud by reading the instrument, and was in fact afforded a full opportunity to do so.”); *see also* Alan M. White & Cathy Lesser Mansfield, *Literacy and Contract*, 13 STAN. L. & POL’Y REV. 233, 251 (2002) (“Even the doctrine of fraud . . . has offered little (and highly unpredictable) relief from the duty to read.”). The fraud often must interfere with the actual ability to read. White & Mansfield, *supra*, at 251–52. Some courts have held that reliance on the fraudulent statements is unreasonable if the misrepresentation does not prevent the party from reading the document. *See, e.g.*, *Del Raso v. United States*, 244 F.3d 567, 571 (7th Cir. 2001) (citing *Spartan Leasing Inc. v. Pollard*, 400 S.E.2d 476, 479–80 (N.C. Ct. App. 1991)).

153. *Anderson*, 248 F. Supp. 2d at 591 (quoting *Godfrey, Bassett & Kuykendall Architects*, 584 So. 2d at 1259).

154. *See, e.g.*, *Psenicska v. Twentieth Century Fox Film Corp.*, 409 F. App’x 368, 371–72 (2d Cir. 2009); *Sound Techniques, Inc. v. Hoffman*, 737 N.E.2d 920, 921 (Mass. App. Ct. 2000). *See generally* *UAW-GM Human Res. Ctr. v. KSL Recreation Corp.*, 579 N.W.2d 411, 416 (Mich. Ct. App. 1998) (explaining that integration clauses express the desire of parties to be bound only by what is written in the agreement).

155. *Barnes v. Burger King Corp.*, 932 F. Supp. 1420, 1427 (S.D. Fla. 1996) (holding that the defendant disclosed its encroachment policy in the offering circular and in the franchise agreement and thus an attempt to conceal another document is irrelevant); Russell Korobkin, *The Borat Problem in Negotiation: Fraud, Assent, and the Behavioral Law and Economics of Standard Form Contracts*, 101 CALIF. L. REV. 51, 66 (2013) (citing *Citibank, N.A. v. Plapinger*, 485 N.E.2d 974, 976–77 (N.Y. 1985)) (suggesting that relying on oral statements is never reasonable when a written document contradicts a statement regardless of the presence of a non-reliance clause); *see also* *Steinbeck v. Steinbeck Heritage Found.*, 400 F. App’x 572, 577–78 (2d Cir. 2010) (citing *Capricorn Investors III, L.P. v. Coolbrands Int’l, Inc.*, 886 N.Y.S.2d 158, 159 (App. Div. 2009)) (denying recovery where plaintiff relied on oral promise that conflicts with contract’s no oral modification clause); *Ruffino v. Neiman*, 794 N.Y.S.2d 228, 229 (App. Div. 2005) (“Reasonable reliance on the

contract contains a clause disclaiming reliance on representations from the other party, the failure to read issue becomes more complex. In these cases Professor Russell Korobkin argues that courts split at least four ways when dealing with contracts where the non-drafting party claims that the drafting party made oral promises contrary to the written contract.<sup>156</sup> Largely, this split results because of questions about what underlying legal framework is most relevant to such contracts, contract law or tort law.<sup>157</sup> The case of fraudulent inducement illustrates that courts may see past the duty to read to combat fraud, but it offers insufficient precedent to argue that failure to read can be excused in other circumstances.

### 3. *The duty to read and unconscionability*

The other exception to the duty to read arises under the procedural prong of the doctrine of unconscionability. If there were impropriety in the process of entering a contract, a court may

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alleged misrepresentations is a necessary element of both fraudulent and negligent misrepresentations and, where the alleged misrepresentations conflict with the terms of a written agreement, there can be no reasonable reliance as a matter of law.” (citations omitted)).

Courts are more likely to excuse failure to read when the fraudulent statements themselves induced reliance without reading. Some jurisdictions, however, take a harsher view towards those who fail to read. *See generally* 66 AM. JUR. 2D *Reformation of Instruments* § 87 (2015).

[A] contracting party is negligent if he or she relies upon the other party’s statement and signs the contract without reading it. . . . Pursuant to some statutes, a failure to read an instrument before signing or accepting it. . . has been held to constitute a bar to reformation where relief is sought on the ground of mistake induced by false representations. . . [when] the circumstances were such that the complaining party, by the exercise of reasonable diligence, could have obtained knowledge of the truth.

*Id.* (footnotes omitted).

156. Korobkin, *supra* note 155, at 70. Korobkin’s first category are those cases where courts simply “follow the complaint,” meaning that they analyze the case under the principles presented in the plaintiff’s pleading. *Id.* at 63. Plaintiffs typically present the dispute in a tort-oriented fraud framework that permits courts to circumvent the preference for signed writings under the parol evidence rule. *Id.* at 64. Courts using the second approach purport to analyze such cases in terms of fraud but instead effectively enforce the parol evidence rule. *Id.* at 64–65. The third approach keys on the distinction between “fraud in the inducement” and “fraud in the execution.” *Id.* at 68. “[T]he reasoning is that the parol evidence rule precludes a claim of ‘she promised me X,’ but it does not preclude a claim of ‘she told me the document promises X.’” *Id.* The fourth and final approach is “[s]cienter-[b]ased,” relying on intentional or reckless prior false representations regarding the quality or extent of consideration. *Id.* at 69.

157. *Id.* at 57.

combine that with evidence of severe terms to find the contract unconscionable.<sup>158</sup> If a contract is unconscionable, failure to read loses significance. The factors that suggest procedural unconscionability include the lack of adequate opportunity to read the contract based on time pressure or failure to give a copy of the contract, and knowingly taking advantage of deficiencies in language, education or diminished capacity of the other party based on age, health, immediate distress, or similar circumstances.<sup>159</sup> Procedural factors are often listed by courts but without independent significance and operate only as add-ons to more egregious circumstances. These factors include disparity in bargaining power, adhesion, industry-wide monopoly on terms, and contracts for necessities.<sup>160</sup> Procedural unconscionability may ease the court’s concern with failure to read, but a person of average education and language skills, who is not known to be in a present crisis mode, who has access to a computer and is involved in social media or online shopping is not likely to sustain a procedural unconscionability claim, notwithstanding the existence of the secondary factors.

Professor Robert Hillman is concerned that merely giving customers the opportunity to read will result in courts being unable to find procedural unconscionability.<sup>161</sup> He argues that mandatory disclosures may backfire by making questionable terms enforceable while doing nothing to increase reading or encourage businesses to

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158. See, e.g., *Sosa v. Paulos*, 924 P.2d 357, 363 (Utah 1996) (excusing a patient’s failure to read an arbitration agreement because of the “rushed and hurried” manner in which her assent was obtained just minutes before going into surgery); see also 27 WILLISTON ON CONTRACTS, *supra* note 92, § 70:113 (“[T]he duty to read and understand the terms of a contract before signing it is obviated when a party’s failure to read the agreement results from procedurally unconscionable behavior of an opposing party . . .”).

159. See *Sosa*, 924 P.2d at 362 (highlighting the “[f]actors bearing on procedural unconscionability”); 8 WILLISTON ON CONTRACTS, *supra* note 92, § 18:10 (noting that procedural unconscionability “relates to procedural deficiencies in the contract formation process, such as deception or a refusal to bargain over contract terms”); see also *Mazur v. eBay Inc.*, No. C 07-03967, 2008 WL 618988, at \*4 (N.D. Cal. Mar. 4, 2008) (defining unconscionability as “oppression and surprise”).

160. *Sosa*, 924 P.2d at 362; see 8 WILLISTON ON CONTRACTS, *supra* note 92, § 18:14 (“[T]he greater the harshness or unreasonableness of the substantive terms, the less important the regularity of the process of contract formation that gave rise to the term becomes.”).

161. See Robert A. Hillman, *Online Boilerplate: Would Mandatory Web Site Disclosure of e-Standard Terms Backfire?*, in *BOILERPLATE: THE FOUNDATION OF MARKET CONTRACTS*, *supra* note 99, at 83, 92–93 (positing that forced disclosure would “legal[ly] backfire” since it “would narrow consumer rights rather than expand them”).

draft reasonable terms.<sup>162</sup> Curiously, by “mandatory disclosures” he means only requiring a business display on its homepage the terms of its browsewrap or a clearly identified hyperlink to terms.<sup>163</sup> In essence, then, he argues that if there is a clickwrap or a clearly identified link on a homepage, sufficient notice exists to satisfy the procedural prong and thus makes a ruling of unconscionability quite unlikely.<sup>164</sup> If the existence of a mere link is sufficient to reach this result, then an admission of having followed the link and read any part of the wrap is utterly damning.<sup>165</sup>

In some cases, the court specifically notes that the plaintiff’s admission of having read at least part of the contract or the notice of a change in the contract is important to its decision.<sup>166</sup> This point is illustrated in some very recent cases. In *Rodriguez v. Instagram, LLC*,<sup>167</sup> an Instagram user, who read the terms enough to learn how to opt out of the new arbitration provision, filed a complaint in federal court alleging the unilateral modification of the contract was a breach of the duty of good faith.<sup>168</sup> Obviously aware of the new terms, the user continued to use her Instagram account, and the court found this to be a knowing acceptance of the new terms.<sup>169</sup> The court distinguished this case from *Badie v. Bank of America*,<sup>170</sup> where the court held that the use of a unilateral change of terms provision to implement a forced arbitration agreement, that was avoidable only by closing one’s account, violated requirements of “good faith and

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162. *Id.* at 83–84.

163. *Id.* at 83.

164. *Id.* at 84, 92–93.

165. Hillman explains that most states require both procedural and substantive unconscionability to strike a contract clause. Terms that are “insufficiently outlandish” to warrant the extremely rare holding that they are unenforceable merely as a matter of substantive unconscionability will be enforced because the opportunity to read removes the procedural unconscionability. *Id.* at 92–93.

166. Recent examples abound. For instance, in enforcing a gym membership contract, the court comments that the plaintiff, who did not graduate from high school, “admit[ted] she read and understood the agreement” when it enforced the contract. *Ramirez v. 24 Hour Fitness USA, Inc.*, No. H-12-1922, 2013 WL 2152113, at \*5 (S.D. Tex. May 16, 2013), *aff’d*, 549 F. App’x 262 (5th Cir. 2013) (per curiam). In Pennsylvania, a court enforced an arbitration clause in relation to a suit arising from the murder of an assisted care facility resident by another resident where the plaintiff “indicated that she read and understood the agreement.” *Estate of Hodges v. Meadows*, No. 12-cv-01698, 2013 WL 1294480, at \*7 (E.D. Pa. Mar. 29, 2013).

167. No. CGC-13-532875, 2014 WL 895438 (Cal. Super. Ct. Feb. 28, 2014).

168. *Id.* at \*1–2.

169. *Id.* at \*2–4.

170. 79 Cal. Rptr. 2d 273 (Cal. Ct. App. 1998).

fair dealing.”<sup>171</sup> The notice in *Badie*, which was included with monthly bills and notices, “was not designed to achieve knowing consent” to the new provision.<sup>172</sup> Nothing suggests that the plaintiff actually saw or read the terms. In contrast, the plaintiff in *Rodriguez* “had a full and perfectly reasonable opportunity to read, and did read, the New Terms; she could have declined the revised agreement.”<sup>173</sup> The party prevailed who did not read the new terms notice.<sup>174</sup> Thus, the customer’s best chance is remaining ignorant until the business attempts to enforce the terms in a wrap contract.

### III. SEEKING SOLUTIONS TO SAVE WRAPS

How can the risks of wraps be reduced? Intuitively, it makes sense to base the enforcement of wrap contracts on the concepts of the duty to read and sufficient notice. Once on notice that contract terms exist, adults in our society are expected to realize that legal consequences will attach and take responsibility to determine the risks. Courts assume that those acting with reasonable diligence will then find the terms, read them, and decide whether to negotiate for better terms or take their business elsewhere.<sup>175</sup> Thus, most of the efforts to bring sense to wrap contracts have focused on notice, although there are a few notable exceptions, such as Professor Radin’s suggested limits on the power of private ordering.<sup>176</sup> Requiring notice of the terms so the non-drafting party can shop around facilitates resolution by the market itself, and thus, such proposals are more acceptable to Adam Smith economists.<sup>177</sup> Requiring notice may work well in theory, but in the online reality,

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171. *Id.* at 284.

172. *Id.* at 290 (internal quotation marks omitted).

173. *Rodriguez*, 2014 WL 895438, at \*3.

174. *See id.*

175. Woodrow Hartzog, *Website Design as Contract*, 60 AM. U. L. REV. 1635, 1644 (2011) (“[I]f the terms of a contract are reasonably communicated, the offeree cannot be absolved from liability for failing to read them because the offeree had a legal duty to do so.”); Charles L. Knapp, *Contract Law Walks the Plank: Carnival Cruise Lines, Inc. v. Shute*, 12 NEV. L.J. 553, 556–57 (2012) (explaining how countless courts hold a duty to read as necessary to contract law and assume that a party with notice has “an ‘option’ to reject those terms—no matter how brief the window of opportunity that existed for the adhering party actually to read, understand and react to them”).

176. *See* RADIN, *supra* note 12, at 189–96 (suggesting filtering systems for personal computers that would alert the user to boilerplate provisions).

177. *See id.* (describing various market solutions for boilerplate contract issues).

most forms of notice do not convey sufficient useful information to function as intended.

The duty to read rule suggests that if a contract can be found, individuals are expected to read and comprehend it before proceeding. Because no one believes online customers read wrap contracts (or realistically could), a more astute analysis must consider whether users are given sufficient notice—not just of the contract’s existence, but also the terms of the contract—to ensure a knowledgeable choice. This Part reviews a variety of proposals for mitigating the excesses of wrap contracts, most of which focus on notice. All of the proposals offer improvements and seem viable, but none is sufficient.

#### A. Notice Proposals

The most common proposals address the sufficiency of notice, with a few creative but limited suggestions.<sup>178</sup>

Many proposals provide notice by slowing the process of acceptance online such that a reasonable user will recognize that the terms are important enough to read. Professor Juliet Moringiello suggests, for example, that courts look for more significant actions indicating assent than merely clicking, so that the electronic acceptance actions more closely resemble the solemnity and psychological weightiness associated with applying an actual signature to paper contracts.<sup>179</sup> One of her suggestions would require users to type their initials near various terms.<sup>180</sup>

Professor Kim proffers some similar ideas. For example, she suggests that parties entering into contracts engage in “multiple

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178. Professor Kim’s book, for example, offers various creative suggestions for giving notice such as labeling the wrap contracts as “Your Legal Obligations” instead of the more innocuous-sounding “Terms” or “Conditions of Use,” KIM, *supra* note 9, at 186, making notice of the terms more visible and readable on the webpage, *see id.* at 187 (finding that a drafter who wants a reader to read the terms would not use “multiwrapping”), giving short notices indicating actions that will soon be taken (i.e. installation of software), *see id.* at 184 (explaining that short notices are effective at informing customers about the product), and providing notice of terms to users in the same way users may provide notice to the company, *see id.* at 192 (referring to this as the “‘turnabout is fair play’ rule”). She would also prohibit the drafting party from making unilateral changes to the contract unless the law has changed. *See id.* at 202.

179. *See* Juliet M. Moringiello, *Signals, Assent and Internet Contracting*, 57 RUTGERS L. REV. 1307, 1347 (2005) (discussing that clicking does not often mean much to the average consumer and that, “[i]f judges find that this is the case, they could require Internet vendors to be more explicit, by requiring a more affirmative act than simply a click”).

180. *Id.*



clicking,” where the consumer clicks “next” to see specific provisions of the contract, signaling an assent to specific parts of the contract individually.<sup>181</sup>

Other examples of Professor Kim’s suggestions include requiring consumers to type out and email assent to the contract to the service provider,<sup>182</sup> or requiring better visual presentation of the online contract within the website or domain so the user is confronted with a visual of what rights are given up and what claims are waived.<sup>183</sup> Courts could draw a bright line that indicates how strong a term must be to require this individual assent.<sup>184</sup> Wraps that “obtain rights belonging to the nondrafting party that are not directly created from the drafting party’s license or promise,”<sup>185</sup> such as a right granted to the drafting party to exploit intellectual property and images posted by the user,<sup>186</sup> for instance, would require such individual assent.

Greater visibility would be, of course, a positive development in educating users that terms exist and that some are more important than others, a fact that might be missed if a person began reading the wrap and lost interest before reaching the overreaching terms. These suggestions, along with the multiple clicking and initialing approach, at the very least, should make consumers more aware that they are entering into binding agreements that warrant further thought.

Unfortunately, these proposals based on signaling the existence and the weightiness of the transaction have some flaws. These extra assent requirements assume that the problems associated with online contracts are primarily about the newness of the forum and the not yet widely understood significance of clicking or merely browsing. Unfortunately, online customers have shown little interest in further thought when other circumstances should have warned them. Clicking a box, scrolling down a set of terms, or clicking “continue”

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181. KIM, *supra* note 9, at 196–97. Essentially this proposal is that courts should require that some specific kinds of terms must be directly, specifically assented to by the user to be enforced. *Id.* She argues that requiring such individual assent would help to eliminate concern that a court is holding a consumer to an unusually burdensome term that she never knew existed. *Id.*

182. *Id.* at 198 (arguing that the process of requiring the user to manually type his or her consent in an email helps to ensure the user is aware of his or her obligations under the contract).

183. *Id.* at 186.

184. *Id.* at 195 (“In other words, sword and crook provisions . . . [should] require specific assent but shield provisions do not.”).

185. *Id.*

186. *See id.* at 52 (describing that companies often “use crook provisions to resell and share customer personal information”).

have become such common actions that they have lost their ability to impress on the mind of consumers the significance of what they are doing. Similarly, these extra actions would lose their luster as they become more routine. The Internet-instant-gratification generation will come to see the required action as a mere time-wasting hurdle slowing their access to the desired product or service. Undoubtedly, consumers will quickly adopt routines for entering the required initials or typing out “I accept” without a single thought or, more likely, they will program their computer to do the required action. Kim admits, “[t]he goal of a specific assent requirement is not to ensure that users read online contracts; rather[,] the goal is to introduce a transactional hurdle that signals the burdensome nature of the transaction.”<sup>187</sup> Just as clicking “I accept” is a better warning than that provided by browsewraps, these additional hurdles provide more meaningful notice to the consumer. However, they will quickly become meaningless, if users do not take significant action in response to the signal, such as reading the terms.

Further, these extra affirmative actions by consumers do nothing to convey the legal implications of the terms so that an intelligent decision about going forward can be made, nor do they do anything about the lack of negotiation power held by consumers. Even if the user reads the wrap and finds offensive terms, what then? A better suggestion may be to require the user to type out “I realize I have waived everything,” and maybe “I realize I have granted valuable rights to the service provider beyond the payment of money.” The fundamental flaw remains: many of the terms are inherently unfair and unreasonable, but the user has no option besides accepting the terms as written or not obtaining the goods or services. Shopping for another vendor is not much of an option if the consumer does not know what terms would provide more protection.

Professor Edith Warkentine offers a different proposal, a more elaborate scheme requiring notice that terms exist, express actions showing assent, and a requirement that the drafter provide an explanation of the meaning of terms.<sup>188</sup> She argues that, if terms are burdensome, they should be enforceable only when courts can identify “knowing assent” in the process.<sup>189</sup> She defines “knowing

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187. *Id.* at 197.

188. See Edith R. Warkentine, *Beyond Unconscionability: The Case for Using “Knowing Assent” as the Basis for Analyzing Unbargained-for Terms in Standard Form Contracts*, 31 SEATTLE U. L. REV. 469, 473 (2008) (advocating for courts to use her “knowing assent” analysis which contains the above three elements).

189. *Id.*

assent” by three criteria: (1) the conspicuousness of the unbargained-for term; (2) the existence of an explanation of the importance of the term; and (3) an objective manifestation of assent that is separate from the general manifestation of intent to enter into a contract as a whole.<sup>190</sup> If courts were to incorporate these three elements, they would make progress in policing wrap contracts. One problem arises in defining words like “conspicuousness,” “unbargained-for,” “explanation,” and “objective manifestation” of separate assent.<sup>191</sup> Another issue is convincing courts to make the investment to delve into weighing the burden of terms and the factual complexities. The latter issue persists in the variety of suggested solutions discussed in the following subpart.

### B. *Increased Judicial Scrutiny Proposals*

Several proposals for taming wrap contracts ask the courts to reassess the level of scrutiny of the procedural aspects and substantive content of wraps. They offer various standards for determining if wraps are enforceable. Courts certainly can, and should, increase the scrutiny and develop common law standards of fairness in the online context. These proposals, however, are not sufficient in the current jurisprudential climate to make a significant change.

Professor Clayton Gillette argues that, in regards to standard form contracts, courts can overlook the lack of knowing assent so long as the parties’ best interests in entering into the agreement are being served.<sup>192</sup> Gillette explains that the contracting parties are best prepared to represent their own interests; thus, if the parties are actively participating in the fulfillment of contractual obligations, the appropriate assumption is that the justifications for requiring assent have been fulfilled.<sup>193</sup> If they are not knowingly involved in selecting terms, then the court should draw parameters around the ability of the more powerful party to impose adhesion terms based on an implied-in-fact type standard.<sup>194</sup> “To the extent [courts] enforce

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190. *Id.*

191. *See id.* (using these terms as part of the “knowing assent” framework).

192. Clayton P. Gillette, *Rolling Contracts as an Agency Problem*, 2004 WIS. L. REV. 679, 681.

193. *Id.* (arguing that rolling contracts “[p]ermit parties to reach agreement over basic terms . . . but leave until a later time, usually simultaneous with the delivery or first use of the goods, the presentation of additional terms that the buyer can accept, often by simply using the good, or reject, by returning it”).

194. *See id.* (reflecting the strategy of powerful sellers to systematically gain advantages over the buyer by discouraging the buyer from reading the contract).

these additional terms, [they] do so because [they] think that the parties either would or should have agreed to them or to terms sufficiently similar that it would not have been cost-effective to bargain for the alternative.”<sup>195</sup> Of course, online customers are not involved in selecting terms beyond price and a product or service description. This proposal would require courts to strike boilerplate terms that do not serve customer interests. Such a doctrine, without extreme limitations and confinement to particularly egregious terms, opens a huge gap where self-serving parties can dispute their own prior choices and raise alternative theories about what is in their best interests. While serving the best interests of parties is generally desired in contract law, at least inasmuch as contract law seeks efficient facilitation of market transactions, it is inappropriate to view this as the sole or primary goal of the assent requirement. The legal system cannot absorb the number of parties who will seek to have contracts rescinded or reformed after realizing they have made an error of judgment if the test is what, in the judge’s view, is in the parties’ best interests.

Professor Robert Lloyd argues for what he calls the “circle of assent.”<sup>196</sup> Like Professors Kim and Moringeillo, he argues that terms should require levels of notice based on how overreaching each one is.<sup>197</sup> Then courts could use a sliding scale of readability and notice considered against the burdensomeness of the terms to measure assent.<sup>198</sup> Unlike the notice proposals in the prior subpart that motivate the user to take more time in indicating assent, this rule seeks the same objective by requiring online businesses to post more warning flags, prompting the consumer to pay special attention to surprising or especially limiting terms.<sup>199</sup> Lloyd’s circle of assent doctrine directs the court to “engage in a totality of the

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195. *Id.*

196. See Robert M. Lloyd, *The “Circle of Assent” Doctrine: An Important Innovation in Contract Law*, 7 *TRANSACTIONS: TENN. J. BUS. L.* 237, 239 (2006) (defining the doctrine as the parties “will be bound by the provisions in the form over which the parties actually bargained and such other provisions that are not unreasonable” given the surrounding circumstances (quoting *Parton v. Mark Pirtle Oldsmobile-Cadillac-Isuzu, Inc.*, 730 S.W.2d 634, 637–38 (Tenn. Ct. App. 1987))).

197. See *id.* at 260 (noting an arbitration clause buried in a computer’s documentation may be enforceable while a clause relinquishing an employee’s right to a jury trial that is buried in a handbook should not be enforceable).

198. *Id.* at 247.

199. See *id.* at 259–60 (stating a company should make an arbitration clause clear, conspicuous, and possibly in a separate document to ensure enforceability).

circumstances analysis and determine whether it really is fair to bind the customer to this term.”<sup>200</sup>

As with requiring more deliberate acceptance, requiring warning flags is a vast improvement over the current system. However, the nature of terms that require warnings and the form of the warnings warrant further exploration. The acceptance of this approach requires courts to change the test for notice. Under the existing, but under-used, unconscionability doctrine, courts can look at the totality of the circumstances and stack up factors suggesting a lack of procedural fairness. However, courts have not accepted the invitation to use aggressively the unconscionability doctrine to police wrap contracts.<sup>201</sup> If courts become motivated to shine a more realistic light on wrap contracts, weighing substance and notice tied to specific types of terms would be a reasonable approach, but judicial willingness to do that has been limited. Judges may be reluctant to make normative decisions weighing in each case the severity of the clauses and the realistic impact of the warnings. A concrete statute or agency regulation, drawing clear distinctions and defining adequate warnings, would be more effective.

Providing more analysis and application to the circle of assent concept, Professor John Murray argues that contract interpretation is ultimately a work of the “judicial vision” of contract.<sup>202</sup> He urges courts to be more willing to attempt to shape contractual law in socially beneficial ways, rather than hopelessly attempting to “discover” the inherent meaning of the contract.<sup>203</sup> Murray rejects the “plain meaning” mode of contract interpretation as literally impossible, and therefore a nonsensical ideal.<sup>204</sup> Interpretation is ultimately done by the court itself after considering “whatever objective manifestations are available to determine what terms they

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200. *Id.* at 263–64. In describing the test, Lloyd includes two basic factors: “1) the extent to which the customer should have been aware of the provision; and 2) the extent to which the provision shifts to the customer a risk the customer was not expecting.” *Id.* at 246. This sliding scale would take into account factors that lend themselves to arguing for both procedural and substantive unconscionability. *See id.* at 263–64. In other words, where an action or term posed by the offending party appears to contain elements of unconscionability but is not necessarily egregious enough to meet high unconscionability standards, the complaining party will still be able to use these facts as evidence that assent did not properly occur.

201. *See supra* Part II.C.3.

202. *See* John E. Murray, Jr., *The Judicial Vision of Contract: The Constructed Circle of Assent and Unconscionability*, 52 DUQ. L. REV. 263, 267–69 (2014).

203. *See id.*

204. *Id.* at 267–68 & n.21.

deem appropriate for inclusion in the constructed circle of assent they create, regardless of the actual intention of the parties.”<sup>205</sup> Accordingly, changing judicial attitudes is the only reasonable reform. Murray continues, “[e]ven where the language of an agreement presents no troubling issue concerning its meaning, its interpretation may be subject to an overriding policy.”<sup>206</sup> Murray points to the historical tendency to enforce charitable promises in the absence of traditional validation devices and to read anti-assignment clauses as narrowly as possible.<sup>207</sup>

Indeed, courts of the consumer protection era were fairly aggressive in applying policy restraints to private ordering.<sup>208</sup> Courts have the tools of unconscionability and good faith doctrines, which would enable them to take action.<sup>209</sup> But current trends have covered existing doctrines with dust as discussed in Part I.<sup>210</sup> Now, most courts fear being labeled as activist and, being more enamored with law and economics jurisprudence, tend to believe they advance economic policy by enforcing contract language as the drafter intended without concern for the user’s intent.<sup>211</sup> If judicial resistance to extending already-weakened contract doctrines into new forms of business practice is not established early, it is very unlikely to come later when the practices become common and judges measure reasonableness against the industry norm. Online contracts had a chance at a fresh perspective and largely missed it.

Moreover, most wrap contracts require arbitration, and many commentators allege there is systemic unfairness and bias that favors businesses in arbitration.<sup>212</sup> Because arbitrators are only paid if hired

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205. *Id.* at 266–67.

206. *Id.* at 390.

207. *Id.* at 391.

208. See Preston & McCann, *supra* note 14, at 151–52.

209. See Juliet M. Moringiello & William L. Reynolds, *From Lord Coke to Internet Privacy: The Past, Present, and Future of the Law of Electronic Contracting*, 72 MD. L. REV. 452, 453 n.8, 468–69 (2013).

210. See *supra* Part I (finding the old doctrines are less applicable to the longer and more complex online contracts).

211. See Preston & McCann, *supra* note 14, at 166–69 (chronicling various Supreme Court and circuit cases while arguing that newly developed trends demonstrate courts have accepted implications of the drafter’s intent rather than manifestations of a user’s knowing assent).

212. See, e.g., Jean R. Sternlight, *Tsunami: AT&T Mobility LLC v. Concepcion Impedes Access to Justice*, 90 OR. L. REV. 703, 704 (2012) (discussing how consumers are negatively impacted by a recent court decision allowing companies to be protected from class actions through arbitration clauses); Letter from Richard M. Alderman et al., Professors of Consumer Law & Banking Law, to Senators Dodd and Shelby and

for a particular case, arguments against arbitration are often based on what is perceived as “repeat-arbitrator bias”—the idea that the arbitrator will favor the repeat players who are more likely to hire future arbitrators.<sup>213</sup> Some recent studies suggest that the research on which this negative perception is based is incomplete and the seemingly high rates of business successes in arbitration may be traced to a combination of factors.<sup>214</sup> But no one is arguing that arbitrators are naturally biased toward consumers. Unlike jurors, arbitrators are more likely to come from the business sector.<sup>215</sup> In addition, arbitrators want to avoid laying down new policy norms and to resolve the dispute at hand efficiently without much focus on the overall social implications of their rulings. The U.S. Supreme Court advised that “the task of an arbitrator is to interpret and enforce a contract, not to make public policy.”<sup>216</sup> Thus, I argue that proposals based on courts adopting more stringent standards without any particular standards are overly optimistic. What is left, then, are new and more creative ways to warn consumers to look out for themselves, with the hope that businesses will back off from aggressive terms so they can keep customers.

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Representatives Frank and Bachus 5–6 (Sept. 29, 2009), *available at* <http://law.hofstra.edu/pdf/Media/consumer-law%209-28-09.pdf> (“Studies . . . suggest[] that arbitration providers are responding to the incentive to find for those who select them: the companies that insert their names in their form contracts.”); *see also* Jay P. Kesan & Andres A. Gallo, *The Market for Private Dispute Resolution Services—An Empirical Re-Assessment of ICANN-UDRP Performance*, 11 MICH. TELECOMM. & TECH. L. REV. 285, 369–70 (2005) (“[S]tudies have generally criticized the UDRP providers for being biased towards complainants and for leaving the respondents without a fair defense.”).

213. *See* David S. Schwartz, *Mandatory Arbitration and Fairness*, 84 NOTRE DAME L. REV. 1247, 1310 n.178 (2009) (citing Lisa B. Bingham, *Employment Arbitration: The Repeat Player Effect*, 1 EMP. RTS. & EMP. POL’Y J. 189, 209–10 & tbls.2–3 (1997)).

214. *See* Christopher R. Drahozal & Samantha Zyontz, *An Empirical Study of AAA Consumer Arbitrations*, 25 OHIO ST. J. ON DISP. RESOL. 843, 846 (2010) (finding no statistically significant repeat-player effect when using a traditional definition, but finding some evidence of repeat-player effect using an alternative definition, and concluding that the results suggest repeat players’ success may be a result of better case screening than arbitrator bias).

215. *See* Larry J. Pittman, *Mandatory Arbitration: Due Process and Other Constitutional Concerns*, 39 CAP. U. L. REV. 853, 859 (2011) (“[B]ecause the current composition of many available pools of arbitrators are non-diverse, possibly biased in favor of repeat players and disproportionately conservative, consumers, employees, and other plaintiffs do not have the same opportunities as corporate defendants to choose decision-makers who might be biased in their favor.”).

216. *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 559 U.S. 662, 672 (2010).

#### IV. TAMING WRAPS

Traditional notions of contract assent and interpretation have primarily worked to ensure that the actual intentions of the differing parties are known.<sup>217</sup> Transactions and interactions tend to be less conscious, less negotiable, less tangible, far more frequent, and more easily hidden in Internet contracting than with traditional standard forms. Notice proposals assume that the immediacy of Internet transactions can be overcome. But increasing consumer notice that terms exist does not adequately address the problems with online contracts. Most importantly, the issue of comprehensibility remains: until there are more aggressive standards for presenting terms in clear and manageable ways, no amount of flashing lights will help. Most proposals fail to make significant improvements in conveying usable information, and so the benefits from increased notice are heavily outweighed by the cumbersome and time-consuming impositions on the user, who will resent the impositions, act no differently, and ultimately receive no benefit.

##### A. Bite-Sized Notice

If courts are going to base enforceability on notice, then the notice must be such that it quickly provides consumers with sufficient knowledge to make a reasonable decision about entering into the contract. Useful notice must reduce the wrap terms down to a concise and understandable format that allows a reader, within the realistic confines of time and patience, to recognize the significance of contract terms and enable efficient comparisons to other product and service providers.

I argue that online contract terms can be commoditized and standardized in such a way as to make rational comparison shopping a reality. Most shoppers can process only a limited number of characteristics of competing products and services. Naturally, the only features that draw any attention are related to: (1) price, (2) appearance, (3) size or quantity, and (4) compatibility with the end use objective. Nonetheless, some detail comparison shopping in even very small transactions flourishes in a few industries and contexts based on disclosure of otherwise opaque product features beyond these four. For example, parents may look for children's pajamas that are flame resistant. Many consumers look for and purchase products that are recycled or recyclable, use less energy, are made in the United States, and

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217. See, e.g., *Postlewaite v. McGraw-Hill, Inc.*, 411 F.3d 63, 69 (2d Cir. 2005) (stating a main tenet of contract interpretation is to construe the agreement in accordance with the parties' intent).



so forth. Most grocery shoppers look at the calorie count and contents on a can or package. Can the legal import of a wrap contract be disclosed in a way that allows similarly efficient and fast comparison of features?

Professor Amy Schmitz proposed, in the arbitration clause context, that companies be required to disclose the terms of their arbitration provisions “in a concise and readable format” through a mandated simple grid that would be posted on a central website.<sup>218</sup> Schmitz persuasively argues that such a disclosure, at a minimum, would alert consumers that arbitration provisions are controversial and carry significant consequences.<sup>219</sup> She suggests that bold disclosures “may prompt consumers to question and perhaps join together to resist or change overly burdensome arbitration terms.”<sup>220</sup> I agree both with the idea of grid type disclosure and that the ultimate goal is to draw sufficient attention to these terms that customers begin to ask questions and push. The best instrument for massive market change is customer protest.

However, I propose something more specific: the “calorie and content” box for a wrap contract. Consider the following example:

Contract [link to contract] includes:	3,453 words (10 standard pages in print)
Mandatory arbitration	Yes
Only binds user, not business	No
Prohibition of suits joined with other users (class actions)	Yes
Place of dispute resolution	Santa Clara County, CA
Applicable law	California
Grant to provider of right to use any content posted by user	Yes
Waiver of: all damages	Yes
Direct damages	
Consequential damages	
Incidental damages	
Punitive damages	
Business’s right to alter contract without posting notice to user	Yes
Business’s right to collect, sort and store data	
For its own use	Yes
For the use of its affiliates	Yes
To sell to others	Yes
User’s right to opt out at [link]	Yes

218. Schmitz, *Legislating*, *supra* note 12, at 168–69.

219. *See id.* at 169–70 (envisioning a central database that may help regulators (and consumers) be more aware of harsh terms).

220. *Id.*

This box is sufficiently direct that a consumer could compare the boxes of a variety of competitors in a reasonable amount of time. Although the legal words are not defined, the meaning could be stated either in lay terms or sufficiently condensed to make using an online search engine to find a meaning more practicable. Further, the selection of these clauses for disclosure signals their importance and a consumer may use such a list as a means for comparison without fully understanding what each type of clause accomplishes. Such a form will not introduce significant costs in preparation; businesses can quickly fill and post the form when attaching a wrap contract to a site.

Of course, as more types of extreme clauses become common, such a form may need to be expanded. The public awareness created by this many disclosures may sufficiently stifle the urge to push the envelope on expanding business-favoring clauses and provide judges with a means of identifying the use of such undisclosed, burdensome terms as unconscionable.

To be effective, such a content box must be posted where consumers can see it. The box message is sufficiently direct that a statement of its existence and a link to the page showing the box that must be followed before proceeding with an “I accept” click beneath the box may be sufficient.

### *B. Best Practice Standard*

The same effect of alerting customers to extreme terms can be met by methods other than the conventional posted notice on the site. Critical to alerting users to an extraordinary contract characteristic is some determination of what “ordinary expectations” actually are. Another variation of the wrap contract “content box” would be a version in which the online service provider must identify what features of its wrap contract differ from a publicly available “standard” wrap contract that has been drafted to balance interests between the parties and recommended for use by a respected entity.

A significant function of the UCC is articulating some carefully considered, interest-balanced terms that apply automatically unless changed by agreement.<sup>221</sup> One option would require disclosure of

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221. See U.C.C. § 1-302(a) (2001) (“[T]he effect of provisions of [the Uniform Commercial Code] may be varied by agreement.” (alteration in original)). Several sections of Article 2 expressly note that the rules are default. See, e.g., *id.* § 2-326(1) (“[u]nless otherwise agreed”); *id.* § 2-327(1) (“unless otherwise agreed”); see also Russell Korobkin, *The Status Quo Bias and Contract Default Rules*, 83 CORNELL L. REV. 608, 615 (1998) (“[T]he ‘off-the-rack’ provisions of the Uniform Commercial

variations in wrap terms from those included the UCC. Many voluntary, private, or collective associations issue standards or “best practice” guidelines. The American Law Institute (ALI), or another such organization, could compile one or more options for a “standard” version of a wrap contract, particularly one that addresses the limited license of intellectual property, and suggest that these terms be adopted in most online contexts. The ALI had such an opportunity when proposing its Principles of Software Contracts (the “Principles”).<sup>222</sup> The principles were drafted as a guide to aid courts and practitioners in navigating transactions involving software contracts.<sup>223</sup> The Principles, however, missed the opportunity to provide a set of balanced terms as a standard and focused instead on the issue of notice in the presentation of online contracts.<sup>224</sup> The Principles have received little attention and have not been cited by courts in the years since their adoption.<sup>225</sup> The American Law Institute also began a project to create a new restatement covering consumer contracts.<sup>226</sup> Although this effort is intended to “restate” existing law, a similar project could draft a model of online contracts containing standard neutral terms.

If such a standard existed, online service providers could save considerable effort by merely incorporating this standard set of terms rather than drafting new terms requiring meaningful additional disclosure. Moreover, a provider could market that it offers the “best practice” terms, which would be freely available online for consumers to view. At the least, consumers may be suspicious of an online service provider that opts not to use the

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Code . . . are majoritarian defaults that save most parties the expense of specifying such terms as time of delivery, place of delivery, or even price in their agreements.” (citing Ian Ayres, *Making a Difference: The Contractual Contributions of Easterbrook and Fischel*, 59 U. CHI. L. REV. 1391, 1396–97 (1992)).

222. AM. LAW INST., PRINCIPLES OF THE LAW OF SOFTWARE CONTRACTS (2010).

223. *Publications Catalog: Principles of the Law of Software Contracts*, A.L.I., [http://www.ali.org/index.cfm?fuseaction=publications.ppage&node\\_id=121](http://www.ali.org/index.cfm?fuseaction=publications.ppage&node_id=121) (last visited Mar. 30, 2015).

224. See Florencia Marotta-Wurgler, *supra* note 83, at 167 (noting that increased disclosure could lead to courts to be more lenient when regulating contract terms).

225. As of March 3, 2015 a search in Westlaw using “Principles of Software Contracts,” “Principles of the Law of Software Contracts,” and “principles /10 software,” returns no relevant cases, other than *Conwell v. Gray Loon Outdoor Marketing Group*, 906 N.E.2d 805, 812 (Ind. 2009), where the fact that the ALI had launched the project was mentioned in passing.

226. See *Current Projects: Restatement Third, The Law of Consumer Contracts*, A.L.I., [https://www.ali.org/index.cfm?fuseaction=projects.proj\\_ip&projectid=25](https://www.ali.org/index.cfm?fuseaction=projects.proj_ip&projectid=25) (last visited Mar. 30, 2015).

standard terms, thus incentivizing online service providers to plainly disclose and justify any deviations.

*C. Limiting Non-Negotiable Terms*

Requiring online service providers to make wrap contracts at least partially negotiable could both resolve the problem of consumer awareness in wrap contract acceptance and give consumers some bargaining power. Some user choices could be inserted into these agreements without eliminating wrap contract efficiency. For example, certain terms, such as arbitration agreements, venue restrictions, or modification clauses, could fall into a category of “necessarily negotiable terms” in wrap contracts. The online service provider would be required to provide some options regarding these terms from which a consumer would have to choose during contract acceptance. An option to exclude a term could possibly be tied to a price if drafters show restraint in actually reflecting the increased cost in the price and not setting a price so high as to be a punishment or penalty for choosing the option. If a choice of venue clause is contained in a wrap contract, the online service provider would be required to allow the consumer to choose between two different venues and affirmatively accept one during the contracting process. Or, for contract modification clauses, the online service provider would be required to ask the consumer which method the consumer would prefer to receive information regarding ongoing contract modifications.

This is not the most effective of my suggestions. Certainly, the negotiation requirements discussed above have great potential of posing significant burdens on both online service providers and consumers. But adopted to some degree, negotiation requirements could be key in eliminating much of the ignorance in the electronic contracting process. To alleviate some concerns for the online service providers, these negotiation options may not necessarily be required of each online service provider, but rather could be one of a few different ways an online service provider could ensure fair notice. Thus, an online service provider could look at a range of possible methods through which it could best avoid lack of assent claims and choose the method that works best for the type of service provided and the types of terms contained in the online service provider’s wrap contract.

*D. Fostering Consumer Outrage*

Public outrage seems to be the most likely effective means of convincing online providers to revise their wrap contracts. Unfortunately, only a few examples of public pressure have occurred thus far, and the result of each was only a change in a single wrap, without a market-wide impact. This subpart gives examples of effective consumer campaigns and offers some suggestions for fostering healthy consumer pushback.

Public backlash was instrumental in reversing a change to Facebook’s privacy policy in January 2011.<sup>227</sup> Facebook announced, via its developer blog, a new feature that would provide application developers with access to user phone numbers and addresses.<sup>228</sup> Though this change was announced quietly at the end of the week, negative public response inspired the company to suspend the feature as of the following Monday.<sup>229</sup> Although the change required users to expressly grant permission for their information to be shared, the surrounding confusion and frequent changes made to Facebook’s privacy policy fueled public skepticism.<sup>230</sup> Further, while application developers are not allowed to share information gathered from Facebook, such policies had been violated previously, as in 2010, when marketing company Rampleaf sold private information gathered from Facebook to advertisers.<sup>231</sup>

This new Facebook feature was publicized on industry websites, such as Gizmodo, where Max Read opined “Facebook should know better than this,” and that such an announcement “shouldn’t be dumped on the Facebook developer blog at 9 p.m. on a Friday.”<sup>232</sup> The feature also troubled security experts like Graham Cluley, who lamented Facebook’s past failures in privacy security, its popularity as a target for data thieves, and ultimately suggested that users

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227. See *Facebook Pushes Privacy Boundary; Users Push Back*, INT’L BUS. TIMES (Jan. 18, 2011, 12:12 PM), <http://www.ibtimes.com/facebook-pushes-privacy-boundary-users-push-back-256191> (noting that, after receiving negative feedback forms, Facebook removed the feature).

228. Laurie Segall, *Facebook Halts Phone Number Sharing Feature*, CNN MONEY (Jan. 18, 2011, 10:33 AM), [http://www.money.cnn.com/2011/01/18/technology/facebook\\_privacy](http://www.money.cnn.com/2011/01/18/technology/facebook_privacy).

229. *Id.*

230. *Id.*

231. See David Goldman, *Rampleaf Is Selling Your Identity*, CNN MONEY (Oct. 21, 2010, 1:13 PM), <http://money.cnn.com/2010/10/21/technology/rampleaf/index.htm>.

232. Max Read, *Third-Party Facebook Apps Could Have Access to Your Address and Phone Number*, GIZMODO (Jan. 17, 2011, 8:00 AM), <http://gizmodo.com/5735382/third-party-facebook-apps-could-have-access-to-your-address-and-phone-number>.

should remove their addresses and phone numbers from the site.<sup>233</sup> Finally, personal responses made by Facebook users through the feedback forums were largely negative, and, in suspending the new feature, the company attributed this decision to “useful feedback” they had received.<sup>234</sup>

Facebook has frequently been at the center of privacy policy controversies, some of which have been resolved through public backlash.<sup>235</sup> In 2012, Facebook subsidiary Instagram updated its Terms of Service to allow private information to be shared with Facebook, other third parties, and most notably, “a business or other entity may pay us to display your username, likeness, [and] photos . . . without any compensation to you.”<sup>236</sup> The *New York Times* publicized this change, stating, “[y]ou could star in an advertisement—without your knowledge”; further, it claimed that this policy possibly violated various state privacy laws.<sup>237</sup> This publicity led to an immediate response. *National Geographic*, a major Instagram user, threatened to stop using the service unless the terms were “clarified,” and numerous ordinary users threatened to quit the service.<sup>238</sup> Instagram reversed the policy, which had not yet been implemented, within days of the initial *New York Times* article.<sup>239</sup>

The Facebook experience is fostered by wide participation and users’ ability to use the site to disseminate information.<sup>240</sup> The likelihood of one or two users noticing a term in a wrap contract or a change in terms is much more likely when drawing from a body of more than a billion users each month and over 757 million active Facebook users each day.<sup>241</sup> Facebook also allows the posting of

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233. Graham Cluley, *Rogue Facebook Apps Can Now Access Your Home Address and Mobile Phone Number*, NAKED SEC. (Jan. 16, 2011), <http://nakedsecurity.sophos.com/2011/01/16/rogue-facebook-apps-access-your-home-address-mobile-phone-number>.

234. *Facebook Pushes Privacy Boundary*, *supra* note 227.

235. *See supra* notes 227–34 and accompanying text.

236. Jenna Wortham & Nick Bilton, *What Instagram’s New Terms of Service Mean for You*, N.Y. TIMES (Dec. 17, 2012, 5:02 PM), [http://bits.blogs.nytimes.com/2012/12/17/what-instagrams-new-terms-of-service-mean-for-you/?\\_php=true&\\_type=blogs&\\_r=0](http://bits.blogs.nytimes.com/2012/12/17/what-instagrams-new-terms-of-service-mean-for-you/?_php=true&_type=blogs&_r=0).

237. *Id.*

238. Brett Molina, *Instagram Updating Policy After Photo Backlash*, USA TODAY (Dec. 19, 2012, 8:11 AM), <http://www.usatoday.com/story/tech/2012/12/18/instagram-privacy-policy-advertisers/1777005>.

239. *See id.*

240. *See* Ami Sedghi, *Facebook: 10 Years of Social Networking, in Numbers*, GUARDIAN (Feb. 4, 2014, 9:38 AM), <http://www.theguardian.com/news/datablog/2014/feb/04/facebook-in-numbers-statistics> (observing that 757 million users log on to Facebook daily).

241. *Id.*

user content, in which Facebook contract terms can be criticized. Very few other online service and product providers are now subject to such scrutiny.

A more recent example of consumer response to a much less frequently used webpage involved the General Mills webpage wrap. In 2013, consumers filed three cases against General Mills in California, alleging that General Mills misled customers by using the terms “Natural” and “100% Natural” on products containing unnatural ingredients.<sup>242</sup> Shortly after failing to have these cases dismissed,<sup>243</sup> General Mills took a step that appeared motivated by the realization of the risk of further litigation. General Mills added a new Terms of Service to its website’s browsewrap.<sup>244</sup> Most notably, the new Terms of Service included a forced arbitration clause which allowed the company to demand secret, non-appealable arbitration overseen by an arbitrator of the company’s choice.<sup>245</sup> General Mills initially provided no notification for the change.<sup>246</sup> After the *New York Times* contacted General Mills, it added a “thin, gray bar across the top of its home page.”<sup>247</sup> It stated, “Please note we also have new legal terms which require all disputes related to the purchase or use of any General Mills product or service to be resolved through binding arbitration.”<sup>248</sup>

In April 2014, the *New York Times* printed a story on the General Mills change. The article reported that the policy precluded consumers from suing in court as soon as “they download coupons, ‘join’ [General Mills] in online communities . . . , enter a company-sponsored sweepstakes or contest or interact with [General Mills] in a variety of other ways.”<sup>249</sup> According to the *New York Times*, the policy

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242. *Bohac v. Gen. Mills, Inc.*, No. 12-cv-05280, 2014 WL 1266848, at \*1 (N.D. Cal. Mar. 26, 2014); *Janney v. Gen. Mills, Inc.*, No. 12-cv-03919, 2014 WL 1266299, at \*1 (N.D. Cal. Mar. 26, 2014); *Rojas v. Gen. Mills, Inc.*, No. 12-cv-05099, 2014 WL 1248017, at \*1 (N.D. Cal. Mar. 26, 2014).

243. *Bohac*, 2014 WL 1266848, at \*9; *Janney*, 2014 WL 1266299, at \*8; *Rojas*, 2014 WL 1248017, at \*8.

244. Stephanie Strom, *When “Liking” a Brand Online Voids the Right to Sue*, N.Y. TIMES, Apr. 16, 2014, at B1; see also Mark Guarino, *General Mills Drops Arbitration Clause, but Such Contracts Are “Pervasive”*, CHRISTIAN SCI. MONITOR (Apr. 21, 2014), <http://www.csmonitor.com/Business/2014/0421/General-Mills-drops-arbitration-clause-but-such-contracts-are-pervasive>.

245. See Burton LeBlanc, *Victory for Consumer Rights: General Mills Drops Its Forced Arbitration Clause*, AM. ASS’N FOR JUST. (Apr. 20, 2014), <https://www.justice.org/blog/victory-consumer-rights-general-mills-drops-its-forced-arbitration-clause>.

246. See Strom, *supra* note 244.

247. *Id.*

248. *Id.* (internal quotation marks omitted).

249. *Id.*

terms suggested that simple consumer actions, such as “liking” the company on Facebook would require consumers to be bound to the legal terms, including the requirement to arbitrate, no matter the nature of the dispute.<sup>250</sup> The *New York Times* article also suggested that the terms may apply when consumers purchased General Mills products.<sup>251</sup> While General Mills argued the terms “were widely misread,”<sup>252</sup> the intent is difficult to discern when the vagueness of the terms leaves so much to judicial interpretation, particularly in light of the notice that suggests the arbitration clause would apply to a purchase or use of a product, without the need to browse the site.<sup>253</sup>

The *New York Times* article was picked up by numerous publication services.<sup>254</sup> The public responded with an onslaught of negative consumer attention on social media websites such as Twitter and Facebook.<sup>255</sup> General Mills reversed the arbitration addition within days and reinstated the prior policy.<sup>256</sup> In the explanation on its website, the company defended its now-rescinded legal terms as having been mischaracterized and simply an attempt to “streamline[] how complaints are handled,” further adding that “[m]any companies do the same [thing].”<sup>257</sup> General Mills specifically identified the negative consumer response as the reason for reversing

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250. *See id.*

251. *See id.*

252. *See* Kirstie Foster, *We’ve Listened—and We’re Changing Our Legal Terms Back*, TASTE OF GEN. MILLS (Apr. 19, 2014), <http://www.blog.generalmills.com/2014/04/weve-listened-and-were-changing-our-legal-terms-back-to-what-they-were>; *see also* Strom, *supra* note 244.

253. *See* Strom, *supra* note 244.

254. The article was picked up by publications including *Consumer Action*, *Houston Chronicle*, *World News*, and many others. *See, e.g.*, Stephanie Strom, *When “Liking” a Brand Online Voids the Right to Sue*, CONSUMER ACTION (Apr. 17, 2014), [http://www.consumer-action.org/press/articles/when\\_liking\\_a\\_brand\\_online\\_voids\\_the\\_right\\_to\\_sue](http://www.consumer-action.org/press/articles/when_liking_a_brand_online_voids_the_right_to_sue); Stephanie Strom, *When “Liking” a Brand Online Voids the Right to Sue*, HOUS. CHRON. (Apr. 16, 2014, 9:30 PM), <http://www.houstonchronicle.com/news/article/When-liking-a-brand-online-voids-the-right-to-5408669.php>; Stephanie Strom, *When “Liking” a Brand Online Voids the Right to Sue*, WORLD NEWS (Apr. 21, 2014), <http://world-newstoday.com/when-liking-a-brand-online-voids-the-right-to-sue>.

255. *See* Saya Weissman, *What Brands Should Learn from General Mills’ Facebook Fiasco*, DIGIDAY (Apr. 22, 2014), <http://digiday.com/brands/general-mills-legal-policy-changes-really-mean>.

256. *See* Foster, *supra* note 252.

257. *Id.*



the change, even while arguing that the new policy was not intended to treat consumers unfairly.<sup>258</sup>

Of course, if the *New York Times* picks up a customer complaint, others who agree with the concerns will be motivated quickly. The *New York Times* can characterize what is scary about the contract terms or changes and the reach of consequences from doing simple things seemingly unrelated to entering a contract. The *New York Times* not only carries instant credibility, its writers know how to turn a phrase. Some of the *New York Times*' assertions about the General Mills terms of service may have been an overstatement, but the message was clear. Unfortunately, most wrap abuses do not get coverage in the *New York Times* and this rare example cannot be a basis for ignoring other reforms.

Notice to the user that terms exist is a start; notice about the content of the terms is better; however, the kinds of notice that academics propose will not translate into the necessary consumer action. Disseminating sufficient information to raise consumers' rightful ire generally will require the effort of experts to read, identify, and explain what the wrap contract purports to do in simple terms. These reports would need to be readily accessible.

One option would be a consumer news service or magazine that provides online reports of customer conflicts involving wrap contracts. Most prospective consumers of an online service will not check there first, but some will. The site could encourage those who share concerns to post information on their Facebook page or circulate it elsewhere. Reports on wrap contracts could be organized by categories of companies (food, clothing, Internet access) or in alphabetical order and should be searchable. Particularly useful in the short run would be a website that identified the top ten or twenty worst offenders. Hopefully, this would have the salutary effect of not only causing the targeted companies to reverse their policies, but also informing other companies of the dangers of implementing such wrap contracts. Of course, an information website will not be as effective as Facebook or the *New York Times*, but it offers an avenue for circulating information. Even more effective would be a requirement that a website with a wrap provide the link to such a service on its home page or next to an “I accept” button.

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258. See *id.* (“Those terms—and our intentions—were widely misread, causing concern among consumers. . . . [W]e felt [the terms] would be helpful. But consumers didn't like it. So we've reverted back to our prior terms.”).

## CONCLUSION

Wrap contract excesses have exceeded their usefulness. It is time to reconsider their scope and enforceability under a variety of situations, especially those involving consumers and routine, small transactions. It is time for courts to take the ethical charge of policing private contracting more seriously and for reinvigorating doctrines such as unconscionability. It is time for economists to confront the concept of market regulations and the ability of consumers to shop around with more honest reality and less abstract theory. It is time for large corporations and online service and product providers to self-impose meaningful notice requirements in standard adhesion contracts or cut back on their terms.

In theory, notice to consumers does facilitate the free market concept that consumers are self-interested actors who will make choices that force the market to better serve their interests or go out of business. However, this economic theory assumes access to information. Notice is a vehicle for providing consumers with information, but notice is empty if it only leads to information that cannot be read within reasonable time constraints, is incomprehensible to almost all online consumers, is misjudged as to enforceability, and cannot be negotiated, especially if it is part of a product or service where the consumer has no viable alternatives. Notice might be the best answer, but only if it is comprehensible and time efficient.

Existing notice proposals will not take a meaningful bite out of wrap contract abuses. If providing notice is the best free market solution, the notice must be such that it conveys manageable information that can be absorbed and compared to the offerings of competitors with a reasonable amount of consumer time and effort. This Article proposes a contents box that distills the relevant information to a useable form. In addition, notice may not be the answer in any form. Better solutions may be the establishment of a best practices standard that allows consumers to quickly determine if the wrap contract on a website conforms to a balanced standard form or requires separate scrutiny. In addition, wraps should be subject to some requirements of negotiability where the consumer has a meaningful choice of options. The use of any of the proposals in this Article will make a significant contribution to educating consumers so they can unite and use their market pressure to insist on change.